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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 487.

UNITED STATES OF AMERICA, PETITIONER,

v.

JAMES E. O'DONNELL, ET AL.

BRIEF FOR RESPONDENTS.

WILLIAM STANLEY,
Attorney for Respondent.

JAMES E. KELBY,
GORDON LAWSON,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINIONS BELOW.

No opinion was delivered by the District Court. The opinion of the Circuit Court of Appeals (R. 967) is reported in 91 F. (2d) 14.

JURISDICTION.

The decree of the Circuit Court of Appeals sought to be reviewed was entered on October 22, 1936. (R. 1034.) On November 19, 1936, petitioner filed a petition for rehearing, which was denied on June 7, 1937. (R. 1035.) On August 19, 1937, an order was granted,

extending the time for filing a petition for certiorari to and including October 7, 1937. (R. 1035.) The petition for a writ of certiorari was filed on October 7, 1937, and was granted on November 8, 1937. (R. 1037.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Does the title asserted by the United States under a purported Mexican grant extend to the land in controversy?

2. Assuming that the title asserted by the United States extends to the land in controversy, is that title established as against Respondents by confirmation proceedings wherein the United States was defendant and as such supposedly representing Respondents, but wherein the United States actually had, and actively asserted, interests adverse to Respondents, in that while the proceedings were pending, the United States purchased the claim from the plaintiffs and upon its own motion secured a *nunc pro tunc* decree in favor of the claim by representing to the court that since the United States owned the claim, the United States as defendant had no objection to a decree for the plaintiffs confirming the claims?

3. Was the Swamp Land Act of 1850 applicable to the land in controversy?

4. Has the United States acquired title to the property in dispute as against respondents by adverse possession?

STATUTES INVOLVED.

The statutes involved are set forth in the appendix *infra*, pp. 96-109.

STATEMENT.

This proceeding was brought by the United States, in equity, to cancel patents held by Respondents to certain swamp lands in San Francisco Bay and to quiet title in the United States to those lands. The Bill of Complaint (R. 2-4) as amended (R. 128-129) asks cancellation of a patent to the land issued by the United States to the State of California and of a patent to the land issued by the State of California to one Darlington. The rights under these patents are now vested in Respondents through mesne conveyances. The answers (R. 45-98) as amended (R. 100-126) assert the validity of the patents and conveyances vesting title in Respondents, deny the validity of the adverse title claimed by the United States and ask that the Respondents' title be quieted as against the United States and that the Court decree that the Respondents are entitled to the possession of the premises and that Respondents be placed in possession thereof.

After a trial on the merits, the District Court entered its decree to the effect that the United States is the absolute owner of the property and that the Respondents have no right, title or interest thereto, and further ordered that the patents and conveyances held by Respondents be delivered up for cancellation, quieting title in the United States. (R. 202-206.) The Circuit Court of Appeals reversed the District Court, the majority holding that the United States had not proved title in itself as against Respondents. (R. 967-1009.)

The facts as shown by the record and by matters of which the Court takes judicial notice are as follows:

Mare Island is a hilly stretch of land in San Francisco Bay, about 2 or 2½ miles long and containing approximately 900 acres, bounded on the West by San Pablo Bay, on the East by Napa Creek and on the South by the Straits of Carquinez. (R. 237-238, 357.) On the North the Island is adjoined by a very narrow strip of wet swamp land from which swamp lands gradually extend out fan-wise for many miles to the Northwest. The tract here in controversy, known as California State Segregation survey "34", is the narrow neck of swamp land extending a short way into the fan-wise extension. The swamp lands adjoining Survey "34" to the north are known as California State Segregation survey "569."

The swamp lands in Survey "34" were, in the period of 1840-1860, at about the elevation of the mean high water, it being a disputed point between the parties to this proceeding as to whether, on the evidence in the record, that part of Survey "34" which adjoined Mare Island was slightly below or slightly above that mark. (R. 600, 815.) Even the Government's evidence, however, shows that all of Survey "34" was overflowed by the tides several times a month (R. 803-805, 815) and was clearly below the line of highest regular high tide (R. 622-627; Plaintiff's Ex. KK, original).[1] The line at the North end of Mare

[1] Upon stipulation, the District Court ordered a large number of original exhibits in the case to be sent to the Circuit Court of Appeals as part of the record. These exhibits are now before this Court and whenever reference is made to one of them in this brief the word "original" will be used unless the exhibit is also printed in the record when only the record citation will be given.

Island where the upland stopped and swamp land tract "34" began was marked by a bank which was the point of highest regular high tide. (R. 790, 792.)

In the spring of 1852 the Secretary of the Navy appointed the Sloat Board to select a site for a Navy Yard in California. (R. 337.) This Board arrived at San Francisco on April 28, 1852, and after an examination came to the opinion that Mare Island presented the most favorable location. On June 24, 1852, the Board wrote to the United States District Attorney at San Francisco asking him to investigate the title to Mare Island. (R. 365.) The United States Attorney found that a Captain G. W. P. Bissell, one W. H. Aspinwall, and the heirs of a Lieutenant McArthur (apparently the naval officer who first made soundings indicating the advantages of Mare Island (see R. 316-318, 333)) claimed title to the island by a conveyance from one Victor Castro who purported to be a Mexican grantee of the Island. (R. 363.) Negotiations were opened looking to a purchase of their claim. (R. 368-372.)

On August 31, 1852, a petition was filed before the Board of Land Commissioners by Bissell and Aspinwall in which they asked that title be confirmed in them to Mare Island under the asserted Mexican grant to Castro. (R. 220-222.)

On November 6, 1852, the Sloat Board transmitted to the Secretary of the Navy its report in which Mare Island was recommended for the naval base. (R. 338-365.) The report states that Mare Island is North of the entrance to the Straits of Carquinez and is bounded on the East by Mare Island Straits, on the West by the

Bay of San Pablo, and on the North by a large tract of tule land extending several miles in the direction of the Valley of Sonoma. (R. 351.) The report further states that the surface of the Island at the South end is broken and elevated, some of the hills rising to the height of 280 feet, but at the North end it is more uniform and may be easily reduced to a convenient grade. *Ibid.* The report further states that Mare Island contains, including a strip of tule on the East side of the Island opposite Vallejo, about 900 acres, all of which it is desirable that the Government should possess, and that the whole length of the Island is a distance of about two miles. (R. 357.) Reference was made to the claim of Bissell and others to the Island under the Castro grant, the Board expressing considerable doubt as to the validity of this grant. (R. 362-364.) Furthermore the Board stated that possession of the Island was held by squatters. (R. 364.) Accompanying this report was a plan of Mare Island which the Board describes as a careful survey of the Island and the Straits. (R. 351.) The Island as shown on this plan consisted only of highlands and did not include any of the swamp lands lying to the north. (R. 842-843.)

Following receipt of the Sloat Board report the Secretary of the Navy conducted negotiations with Bissell and Aspinwall, resulting in a letter from the Secretary of the Navy to the agent of the asserted owners of the Island, dated December 10, 1852, in which the Secretary of the Navy offered to purchase the Island for a cash consideration of whatever portion of an appropriation of $100,000. might remain after all the expenses

of the Sloat Board had been paid. This offer was accepted on December 12, 1852. (R. 312-316.) Meanwhile on December 13, 1852 the Secretary of the Navy had asked the Sloat Board to estimate the value of Mare Island. On the same date the Board responded that the Island, including the tule opposite Vallejo, contained about 900 acres in addition to a large tract of tule extending toward Napa and Sonoma. The Board stated that three-fourths of the Island was recently purchased for a much less sum, but estimated the value at $100,000. (R. 324-326.)

On January 4, 1853, Bissell, Aspinwall and Mary C. McArthur gave their quit claim deed to the United States of all the tract of land and island called and known as Mare Island in the Bay of San Pablo, as recently surveyed by the Board of Officers of the United States sent to California for the selection of a site for the Navy Yard there, including all the tule or low land and marsh belonging to the same, or which has ever been reputed or claimed to belong to the same, and all waters, harbors, bays, creeks, and other waters, privileges, benefits, advantages, tenements, hereditaments and appurtenances thereunto belonging. (R. 302-308.) The survey of the Board of Officers which is referred to as indicating what was conveyed, is the Sloat Board plan which, as we have pointed out, shows the Island as containing only highlands. (R. 842-843.)

On February 9, 1853 the Secretary of the Navy wrote to the President stating that he had it in contemplation to select Mare Island as the site for a Navy Yard and that negotiations had been in progress for the purchase of the island and its appendages. He further stated

that an investigation of the title offered to the United States by those claiming to own the Island had led to some doubt whether the Government did not already possess the paramount right to its occupancy and use. He suggested that it would be proper for the Government to reserve the land for public use and thus assert a title which would at least serve to strengthen any other which might ultimately be purchased. President Fillmore on February 11, 1853 ordered the reservation to be made. (R. 379-383.)

On February 28, 1853, Aspinwall and one Comstock entered into a bond in favor of the United States in the sum of $200,000. conditioned on the indemnifying and saving harmless of the United States against any claim or title to the tract called Mare Island and its appurtenances which might be set up by or through any person or persons claiming under Victor Castro and his assigns, or others represented by Aspinwall and against any adverse claim or title in any other person or persons or body politic which within two years from the date of the bond might be made and thereafter successfully established. (R. 308-312.)

On April 9, 1853, the Secretary of the Navy wrote to Attorney General Cushing asking his opinion as to the title of the Government to Mare Island. The Attorney General's opinion approving title was required by the Appropriation Act as a prerequisite to the expenditure of money on construction of the Navy Yard. The Attorney General's opinion (8 Op. A. G. 422) was that the State of California could set up and probably maintain, as against the title of the United States received under the Castro grant, title to so much of Mare

Island as was subject to overflow by water periodically or otherwise. This applied, the Attorney General held, both to the shores which had been received by the United States from Mexico in trust for the State and to the swamp lands which had been granted by Congress to the State by the Act of 1850. The Attorney General recommended as indispensible prerequisites to any lawful expenditure of public money on Mare Island that an investigation be had into adverse claims to the Island and that the State of California be asked to relinquish its title to the swamp and overflowed lands on the Island.

Following the receipt of this opinion the Secretary of the Navy, on October 3, 1853, wrote to the Governor of California enclosing a copy of Cushing's opinion and asking the Governor to invite the attention of the Legislature to the subject in order that proper acts might be passed ceding the jurisdiction and relinquishing the title of California to Mare Island. (Calif. Senate Journal, 1854 p. 37 and App.) In response to this letter there was passed on May 11, 1854, an act giving the consent of the State to the purchase of Mare Island, and transferring to the United States the title and interest of the State in such portions of Mare Island as were overflowed, beach, or swamp lands on the eastern shore of the Island, "from the Southern point thereof to a parallel intersecting the northern point of the highlands". (Calif. Stat. 1854-1855, C. 43, pp. 48-49, App. *infra,* pp. 105-107)

On September 16, 1854, Commander Farragut took possession of the Island and warned off all the squatters. (R. 769.) On November 16, 1854, Hans Patton,

County Surveyor of Solano County, surveyed a part of the swamp land north of Mare Island, including what is now known as Survey "34", for one Josiah Hanscom who held some school land warrants. (R. 758-759.) This survey stated that it began at the point at the northern end of Mare Island where the hill land stops and the tule sets in on the shore of San Pablo Bay.

On May 8, 1855 the Board of Land Commissioners filed an opinion and decree confirming the Castro grant which had been purchased by the United States. (R. 279-280.) The evidence on behalf of the claimants was to the effect that on or about October 30, 1840 one Jose Victor Castro petitioned the Government of the Department of Californias for a grant of an adjacent island in the Bay of San Francisco, called Mare Island, as a place for putting his stock to protect it from the Indians. (R. 248.) Castro was on October 31, 1840 given a provisional permit to occupy the Island while the usual steps of investigation were being taken. (R. 250.) On the back of this provisional permit as introduced in the Land Commission proceeding was a hand written grant of the Island by Governor Alvarado bearing the date May 20, 1841. (R. 250-251.) The Archives of the Mexican Government contain no record of this hand written grant. (R. 247-250.) One of the principal witnesses for the claimant and the witness who was most familiar with the land claimed was Mariano G. Vallejo. He testified that Mare Island was some 2½ miles in length and contained about ½ league of land, a little more or less. (R. 237-238.) Although there was strong evidence that the hand written grant

was not executed until after the United States took possession of California, nevertheless the Board confirmed the grant on the ground that it did not feel warranted in discrediting entirely the testimony of Governor Alvarado who testified in favor of the grant, and that if any force was to be given to the Alvarado testimony it would have to be for the full extent of his statements. (R. 277-279.)

On June 11, 1855, County Surveyor Patton surveyed the tract herein in controversy for David N. Darlington, Respondents' predecessor. (R. 591-592½.)

On October 20, 1855 a transcript of the Land Commission proceedings was filed in the District Court. (R. 280.)

On October 10, 1856, David P. Wade, County Surveyor of Solano County officially surveyed the tract in controversy under the California Statute with regard to the sale of swamp lands granted by the Swamp Land Act of 1850. This survey is Survey "34". (R. 383-388.)

Sometime prior to March 1857, Counsel for the claimants under the Castro grant, who were appellees on the appeal to the District Court, filed a paper in the District Court entitled "Index of Case". The paper contained the following heading, "Claim of G. W. P. Bissell and William H. Aspinwall to Mare Island, about ½ a league, in Sonoma County". This index of the case also summarized the deposition of Vallejo to the effect that Mare Island contained about ½ a league, a little more or less. At the end of this document was the following statement (Pltff. Ex. C, Original):

> The United States being now the owner of the titles of appellees, a confirmation of this claim inures to the benefit of the Government and no objection is therefore made to a decree in favor of the validity of the claim.

On March 2, 1857 there was entered on the register of the United States District Court in the confirmation proceedings a notation "filed decree of confirmation". (R. 566.) Also on the minutes of the Court for March 2, 1857 an entry appears enumerating a number of cases among which is the case of *United States* v. *Bissell and Aspinwall* to which the following minute is appended, "Decree of confirmation was entered in each of these cases by consent of the United States District Attorney". (R. 567.) However, after due and diligent search the Clerk of the Court in 1879 was unable to find any decree of confirmation on file or of record in the case. (R. 567.) There was, however, in the jacket for the case a form of a decree which had been drafted but which had never been signed or entered in any way. (R. 285-286.) Also in the jacket is an order by the Court dated April 1, 1857 that an appeal be granted in behalf of the United States to the Supreme Court. This order is endorsed "filed April 1, 1857", but is unsigned. (R. 287.) Also in the jacket is a statement signed by the Attorneys for appellees but undated to the effect that in pursuance of notice from the Attorney General it is stipulated that the appeal to the Supreme Court heretofore granted be vacated and that claimants have leave to proceed under the decree of the Court heretofore rendered as under a final decree. (R. 288.) Also in the jacket is a form of an order unsigned

and undated to the effect that on motion of the District Attorney it is ordered that the appeal theretofore granted be vacated and the claimants have leave to proceed under the decree of the Court as under a final decree. (R. 286-287.) No entry appears in the Registry of the Court with regard to the filing of any decree dismissing an appeal. (R. 566.)

On March 18, 1857 the State of California issued a patent to Survey "34", to one Darlington. The patent recited that it was made under the Swamp Land Act of 1850 and the California Act of 1855 providing for the sale of swamp and overflowed lands. (R. 30-33, 388.) This is the patent from the State which Respondents now hold and claim under and is one of the patents which the United States seeks to cancel by this proceeding.

On September 17, 1873 the Chief of the Bureau of Yards and Docks, Navy Department, appointed a Board of Engineers to present a plan for the development of the Mare Island Navy Yard. (R. 483-485.) At the same time Commandant John Rogers, in charge of the Navy Yard at Mare Island, was notified of the appointment of this Board and that they would soon arrive at Mare Island. (R. 482.) On September 26, 1873 Commandant Rogers wrote to the Chief of the Bureau of Yards and Docks, Navy Department, stating that the tule land extending towards Napa and Sonoma was valuable to the Government, but that he had been admonished not to take sand at a distance of 50 feet from the foundery. The foundery, erected in 1858, was on the uplands of the Island right next to the point where the upland stopped and the tule lands comprised in

Survey "34" began. Commandant Rogers stated that it was very desirable that the question of title should be settled and suggested that the matter be referred to the District Attorney. On September 29, 1873 Commandant Rogers sent out a steam launch with carpenters and material for putting up a cabin on the far end of the swamp land comprising Survey "569" on Sonoma Creek. (R. 776.) Also a cabin was put on the swamp land about a mile north of the foundery on the San Pablo Bay side. (R. 777.)

On November 19, 1873 the Board reported on the development of Mare Island stating that they had been informed by Commandant Rogers that there was a question as to the title to the tule on the northerly side of the Island, certain parties claiming the same by virtue of a title held from the State of California. (R. 486-489.) On November 25, 1873 Commandant Rogers wrote to the Board of Supervisors of Solano County stating that certain persons having petitioned the Board of Supervisors to adopt measures to reclaim the tule land appertaining to Mare Island, it was his duty to notify the Board that this land was claimed and occupied by the United States under a purchase of the land dated January 4, 1853. (R. 800-801.) On November 24, 1873 Commandant Rogers wrote to the Registrar of the State Land Office, Sacramento, California, notifying him that the tule land of Mare Island was claimed and occupied by the United States. (R. 838-839.)

On July 19, 1877, H. G. Rollins, the United States Surveyor General for California ordered James E. Freeman, Deputy Surveyor, to survey the Bissell and

Aspinwall claim. (R. 563-565.) The survey was completed by Freeman on August 1, 1877 and in it he included about 7½ miles of the swamp land North of Mare Island, including both Survey "34" and part of Survey "569" up to a series of sloughs which he found traversed the swamp. The total amount included by Freeman as Mare Island was 5227 29/100 acres. (R. 711-720.) On January 18, 1878 I. W. Ames, Rollins' successor, executed a certificate to the effect that notice of the Freeman survey had been advertised as required by the Act of July 1, 1864. The certificate also stated that the plat of the survey was retained in the office subject to inspection for 90 days from the date of the first publication. (R. 709-710.)

On July 5, 1879 Attorneys representing respondent's predecessors wrote to the United States Surveyor General for California protesting against the Freeman survey and against the signing and confirmation thereof, and respectfully requesting that if notwithstanding the protest the Surveyor General should sign such survey and forward the same to the General Land Office he should at the same time forward the protest. This protest was made on behalf of not only the owners of Survey "34" but also the owners of Survey "569". (R. 583-585.) On July 16, 1879, the same Attorneys wrote to the Commissioner of the General Land Office stating that it had come to the knowledge of the owners of certain tule, swamp or overflowed land adjacent to Mare Island that the Government had recently surveyed the land to itself. The letter made a formal protest against the survey and against the consideration or confirmation of the survey by any Department or

Bureau of the Government, and requested that if testimony be necessary the Commission take the same at the earliest practicable date. (R. 589-590.)

On July 25, 1879, the Commissioner of the General Land Office wrote to the United States Surveyor General at San Francisco to forward a copy of the final confirmation of Mare Island to Bissell and Aspinwall by the United States District Court and asked whether the Island had been surveyed. (R. 732-733.)

On August 7, 1879 the Surveyor General replied that although it appeared from the Court records that a decree of confirmation was ordered to be entered on March 2, 1857, no such decree had been found. The Surveyor General stated that there was enclosed with the letter a copy of the plat of survey and field notes of Freeman's survey, together with the protest made by the Attorneys for Respondents' predecessors. With regard to the Freeman survey the Surveyor General stated that he considered the survey incorrect, in that it not only included tracts which were properly islands in themselves but also embraced a large quantity of tide land, and stated that the survey should be limited to the area contained south of a line run across the Island from the vicinity of station No. 54 to station No. 138. (R. 593-594.) The line so run excludes the land here in controversy. Pursuant to Wagner's recommendation the Commissioner of the General Land Office declined to accept the survey. (Pltffs. Ex. J; pp. 46-47, 58, original.)

On December 5, 1883, the District Attorney in California advised the Navy Department that a suit had been instituted against the Government for the recov-

ery of a large tract of tule land at Mare Island. (R. 842.) The suit to which the District Attorney had reference apparently was that of *San Francisco Savings Union* v. *Irwin,* 28 Fed. 708, affirmed 136 U. S. 578, in which ejectment was granted against the Commandant of the Navy Yard with regard to Survey "569". In the period from 1886 to 1900 the successful parties in this case built levees around all of Survey "569" and a large part of Survey "34". (R. 597, 599, 778, 850, and map opposite R. 614.) The land thus reclaimed was used for pasture and hay land. (R. 599.)

On February 25, 1886, a corrected report of Spanish and Mexican grants in California was prepared by the State Surveyor General and published as a supplement to his official report. (R. 531-532.) This statement shows the claim of Bissell and others to Mare Island but indicates that no final decree had been entered on the claim and indicates that the claim had not been entered on the General Land Office map.

By 1905 Respondents' predecessors had commenced a suit in ejectment against the Commandant of the Navy Yard for possession of Survey "34". (R. 735-738.) This litigation finally reached a decision in the Federal District Court on February 7, 1914. *Sawyer* v. *Osterhaus,* 212 Fed. 765, (C. C. N. D. Cal.). The Court held that since Respondents' predecessors had no legal title, the legal title remaining in the United States until issuance of patent, the action of ejectment could not be maintained.

Meanwhile on July 29, 1912, the State of California had applied to the United States Land Office for certification to it of Survey "34" as swamp land passing

under the Act of 1850. (R. 543.) This application was still pending at the date of the decision in *Sawyer* v. *Osterhaus*. Shortly after that decision the Commissioner of the General Land Office advised that possession should be taken of Survey "34" without delay and the United States in that same year erected a fence at the northerly boundary of Survey "34", commencing steps to fill in the land for Government use. (R. 623, 786.) A new dike was built by the Government joining the dike originally erected by the private parties and running in the general direction of the Engineering Building so as to enclose that part of Survey "34" which was not enclosed by the privately built dike. (Defts. Ex. 3, reproduced App. *infra*, p. 120.) Thereafter a contract was let for the filling in of this land. *Ibid.* This filling process was gradually completed during the following years, and buildings and other improvements were made thereon.

On September 16, 1914, California's application for certification of the land was rejected, subject to appeal to the Secretary of the Interior, by the Land Office. (R. 543-551.) However, on November 12, 1914, the Interior Department wrote to the Register and Receiver at San Francisco stating that the previous rejection was held up to await a survey. (Ex. J, p. 35, original.) Respondents' predecessors had brought a mandamus action in the Supreme Court for the District of Columbia to require a survey of Mare Island. A writ requiring such survey issued in this proceeding on February 15, 1915. (R. 181.) In response thereto the United States Surveyor General, with the approval of the General Land Office, ordered one Lightfoot to make the

survey. (R. 596; Pltffs. Ex. J, p. 37, original.) The Lightfoot survey was made in August, 1915, and Lightfoot's report was filed on October 11, 1915. (R. 595-620; Ex. J, p. 27, original.) After consideration of this survey the Interior Department on December 4, 1920 vacated its previous decision (Ex. J, pp. 36-37, original) and on January 27, 1921, instructed one Joy to make a further survey and report with regard to the land in controversy. (R. 622.) On October 23, 1922 Joy filed a report in which he found that in 1850 the narrow strip just to the North of Mare Island was overflowed by extra high tides and at ordinary high tides with a stiff wind from the Southwest. (R. 621-627.) On August 17, 1923 the Land Office rejected the original Joy survey and ordered it revised. In this decision it was also determined that a patent should issue for Survey "569" but should not issue for Survey "34". (R. 630-632; Pltffs. Ex. J, pp. 37-39, original.) On November 8, 1923, a revised plat was filed by Joy. (R. 627-629.)

Thereafter respondents filed in the Supreme Court for the District of Columbia a petition for a writ of mandamus to require the Secretary of the Interior to decide whether the land in controversy was in 1850 swamp and overflowed land within the meaning of the Swamp Land Act. The relief prayed for was granted on May 27, 1924 and in response to the writ of mandamus the Secretary of the Interior on January 10, 1926, determined that the lands were swamp and overflowed lands in 1850, but refused to certify the lands for patent until the Secretary of the Navy had time to offer objections. On February 12, 1925, the Secretary

of the Navy filed a protest with the Secretary of the Interior against the issuance of the patent, and on October 13, 1925, the Secretary of the Interior decided that he would not certify the land for patent. (Pltffs. Ex. J, pp. 48-58, original.)

On May 25, 1925, respondents filed in the Supreme Court for the District of Columbia a petition for a writ of mandamus to require the Secretary of the Interior to issue a patent. (Pltffs. Ex. J, pp. 1-4, original.) The Supreme Court for the District of Columbia determined that the writ should issue and this determination was affirmed by the United States Court of Appeals for the District of Columbia in *Work* v. *United States ex rel O'Donnell,* 23 F. (2d) 136. No petition for certiorari was filed in this Court. Thereafter on March 8, 1928, in response to the writ of mandamus, the Secretary of the Interior directed the Commissioner of the General Land Office to issue the patent. (R. 35-36.) On March 9, 1928, a patent to Survey "34" was issued to California. (R. 33-35.) It is this patent together with the patent issued by California to Darlington in 1857 that the Government seeks to cancel in this action.

On the 15th day of April, 1930, George J. Hatfield, United States Attorney for the Northern District of California filed an *ex parte* motion in the United States District Court for the Northern District of California bearing the title of the confirmation proceeding of the Castro grant, viz: *"United States* v. *G. W. P. Bissell and W. H. Aspinwall",* in which he asked the Court to enter a decree *nunc pro tunc* as of March 2, 1857, affirming the decision of the Board of Land Commissioners confirming the Castro grant. Pursuant to this mo-

ion United States District Judge A. F. St. Sure (the ame Judge that heard the instant case below) on April 5, 1930, entered a decree *nunc pro tunc* affirming the Land Commission decision. (R. 289-291.) This *nunc pro tunc* decree states that on March 2, 1857, the Court directed the entry of a decree of confirmation in the matter by consent of the United States District Attorney, but that a decree in conformity with the order had as yet never been entered and that the case was still pending and undecided. The *nunc pro tunc* decree further states that all right, title, and interest of the appellees (claimants) had passed to and been acquired by the United States, the appellant, by purchase from the appellees and that all persons claiming thereunder or through the appellants or appellees or any of them were chargeable with notice of the action and of every thing that had been done therein, and therefore that no rights of third persons had intervened or could intervene.

The instant proceeding was commenced by the United States in November, 1930. (R. 18.)

SUMMARY OF ARGUMENT.

The United States seeks to cancel Respondents' patents issued under the Swamp Land Act of 1850 (App. *infra*, pp. 96-97) on the ground that the land had passed into private ownership by virtue of a grant of Mare Island purportedly made by the Mexican Governor of California in 1841. The rights under this purported grant were purchased by the United States in 1853. Although this grant has heretofore been held to be fraudulent at the instance of the United States, (see

Bouldin v. *Phelps*, 30 Fed. 547, C. C. N. D. Cal.), the United States now takes the position that the validity of the purported grant is conclusively established by certain proceedings brought for its confirmation.

(1) Even assuming the validity of the Mexican grant, however, it does not cover the land in controversy, which is below highest high tide. Under the Civil Law in force in Mexico, the seashore ran to the highest annual high tide and a grant of land bordering on tidal waters terminated at that point. Moreover, the grant was generally understood at the time to cover only the highlands.

No enlargement of the grant has occurred since California was ceded to the United States. The United States may not rely on the confirmation proceeding to accomplish this result, but even if that proceeding were to be considered it would not establish any enlargement. The purpose of that proceeding was simply to confirm the rights which existed prior to the cession, not to add to those rights, and interpreted in this light, a confirmation decree will not be considered as an enlargement of the area originally granted unless that result is clearly required by the language of the decree. The decree of the Board of Land Commissioners here stated that the land, being an island, was "bounded by the water's edge" and the District Court in its *nunc pro tunc* decree refers to Mare Island "with its natural boundaries". This language is entirely consonant with the original boundaries of the grant. Furthermore the Government is limited by the extent of the claim made in the confirmation proceedings, which was limited to the highlands. No different result can be drawn from

the Freeman Survey, made under the unsigned and unentered decree of the District Court in the confirmation proceeding, because that survey was rejected both by the Surveyor General and the General Land Office.

(2) The existence and validity of the Mexican grant, however, has not been established. It is solely on the asserted conclusive and binding effect of the confirmation proceeding that the Government depends for this purpose. But that proceeding was collusive and nonadversary. Shortly after the petition was filed before the Board of Land Commissioners the United States bought the interest of the claimants and thereafter carried on the litigation as real party in interest against itself. On appeal, the Statement of the Case filed in the United States District Court specifically stated that since the United States had purchased the claim it had no objection to confirmation. No final decree was signed or entered at that time (1857) although one apparently was ordered, and 73 years later (1930) the United States Attorney applied for and received a *nunc pro tunc* decree confirming the claim. On these facts the case was undoubtedly collusive and nonadversary and any decree entered in it was null and void and not *res judicata* on innocent persons not parties thereto.

Moreover the basic principles dealing with representation of persons not actual parties to a suit forbid the contention that respondents are bound by this proceeding. Persons holding prior grants from the United States were not permitted to intervene in the proceedings for confirmation of Mexican grants, the intention being that their interests would be represented by the

United States. Here, however, the United States which, as party defendant was supposedly representing California, its grantee under the Swamp Land Act, bought up the rights of the claimants, adverse to California, and actively asserted them in the proceeding. In such a case California was not, in fact, represented in the proceeding and neither California nor its grantees are bound thereby.

Also on another ground the confirmation proceeding is not conclusive here. The Swamp Land Act of 1850 was a grant *in praesenti*. From the date of the Act the United States held legal title to these swamp lands in trust for California. While this relationship existed the United States could not, in equity, purchase an adverse claim to the property and establish that claim by litigation against itself as holder of the legal title. This disability is not dependent upon proof of actual fraud, nor is it confined to strict trustees, but it is a broad and absolute disability extending to all who act in a representative capacity.

Conclusiveness of the confirmation decree in no way can be supported on any laches of respondents. In 1873 when the Government first made an attempt to take possession, respondents' predecessors protested and they have been actively and continuously, to the knowledge of the Government, asserting their rights in the property ever since. The United States did not actually take possession and commence to improve the property until 1914, at which time there was pending the proceeding in the Department of the Interior which finally resulted in the issuance of a patent in 1928, and prior to which time an ejectment suit had been brought

and dismissed because respondents' predecessors did not have legal title.

(3) Assertion that the lands in controversy were withdrawn from the operation of the Swamp Land Act because claimed in 1850 under a Mexican grant rests upon a misconception of both the facts and the law. The land in controversy was not claimed under the purported Mare Island grant in 1850. That grant legally extended only to highest high tide and there is no evidence that anyone in 1850 was claiming to the contrary. Even if the fact were otherwise, however, the Swamp Land Act would still apply unless the land had actually passed under a valid Mexican grant covering the property. Withdrawal of land claimed to have been granted by Mexico but not actually covered by a valid grant was not effected by the Treaty of Guadalupe Hidalgo and is entirely dependent on statute. No statute withdrawing such lands had been enacted in 1850. There having been no withdrawal, the lands in controversy clearly passed to California under the Swamp Land Act, and the title of California and Respondents, California's grantees, may be defeated only by showing that the land had previously passed under a valid Mexican grant. No such showing is made here.

(4) The United States has acquired no title by adverse possession. At the time Commander Farragut took possession of the Island itself in 1854, it was understood that California had title to the swamp lands north of the Island and all parties acted accordingly for 19 years. Excursions on the land for sand and the setting up of a target for a ship to shoot at were, in that wild country, no evidence of claim to possession

or ownership. When, in 1873, the Commandant of the Navy Yard first decided to claim title to the land, he sent, over the protest of Respondents' predecessors, men to build two shacks on the swamp far north of the Island. These shacks were soon deserted, however, and after the decision of this Court in *Irwin* v. *San Francisco Savings Union,* 136 U. S. 578, holding that the Government had no right to possession of Survey "569", the Government abandoned any claim to the swamp lands north of the Island. The owners of Survey "569" thereupon built levees enclosing not only "569" but also most of Survey "34" here in controversy, and the land so reclaimed was farmed by the private parties until 1914 when the Government entered, took possession, built a fence on the northern boundary of "34", filled the land and commenced the construction of buildings and other works.

These facts show that no possession was taken by the Government until 1914 and possession from that time on would not establish adverse possession for the reason that proceedings were then pending before the Interior Department for a patent. These proceedings did not terminate until the issuance of a patent in 1928.

Constructive possession cannot be relied upon here for the reason that the title under which the Government occupied the Island did not with any definiteness, if at all, include the specific swamp lands here in controversy.

In any event, adverse possession does not run against grantees from the Government, as are respondents here, until patent is issued. No patent having been issued until 1928, the Statute of Limitations did not

commence to run until that time. And even if every factor were present here which would normally give adverse possession, the Government may not secure title from a citizen in that manner where that citizen has by protest timely apprised the Government of his rights.

ARGUMENT.

I.

Background of the Case.

In controversy here is title to part of a tract of swamp land lying north of certain highlands in San Francisco Bay known as Mare Island. Respondents hold patents to the land from the United States and the State of California under the Swamp Land Act of September 28, 1850, C. 84, 9 Stat. 519. (App. *infra*, pp. 96-97.) It is the contention of the United States that the swamp land was encompassed within an alleged grant of Mare Island by the Mexican Government to one Castro. The United States in 1853 purchased the rights under this alleged grant and by reason of that fact now claims a paramount title to the swamp land and brings this proceeding in equity seeking cancellation of Respondents' patents and the quieting of title in itself.

This Court has already had before it the question of the status of this swamp land. *Irwin* v. *San Francisco Savings Union*, 136 U. S. 578. The swamp land north of Mare Island was divided into several tracts and sold by California under the Swamp Land Act. The tract closest to the Island and identified as California State Segregation Survey "34", was purchased by Respon-

dents' predecessors and is the part in controversy here. The tract adjoining Survey "34" to the north and identified as California State Segregation Survey "569", was purchased by others. The *San Francisco Savings Union* case was a proceeding in ejectment against the Commandant of Mare Island Navy Yard brought by the purchasers of Survey "569". This Court affirmed per curiam the decision of Mr. Justice Field on circuit holding that the United States received no title to the swamp lands north of the Mare Island highlands under the purported Mexican grant.[2]

Shortly after the decision in the *San Francisco Saving Union* case, a proceeding in ejectment to recover the whole of Mare Island was brought by parties claiming under a conveyance from Castro prior in time to the conveyance from Castro under which the United States claims title. In defending the case the District Attorney, representing the Commandant of the Navy Yard, and one A. L. Rhodes, representing the United States, successfully contended that the alleged Mexican grant to Castro was fraudulent and that Mare Island passed from Mexico to the United States as part

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[2] There is now pending in the District Court below an action (*United States* v. *Stewart*, Equity 2685-5, D. C. N. D. Cal. S. D.), similar in character to the instant case, brought by the United States to cancel the patents issued under the Swamp Land Act to Survey "569", in spite of the holding in the *San Francisco Savings Union* case that the Government had no right to possession of that property. Since the contention of the Government there, as here, is that the purported grant of Mare Island covered all of the swamp land north of the Island up to a series of sloughs which have been found to cross the swamp, the District Court is holding the proceeding under advisement pending the final outcome of the case at bar.

of the public domain. *Bouldin* v. *Phelps,* 30 Fed. 547 (C. C. N. D. Calif.)[3] The United States now claims under the grant which it repudiated in the *Bouldin* case.

About 1905 Respondents' predecessors in title brought ejectment proceedings against the Commandant of the Mare Island Navy Yard to secure possession of Survey "34". (R. 736-738.) These proceedings terminated in 1914, the Court holding that ejectment would not lie because Respondents' predecessors held no patent. *Sawyer* v. *Osterhaus,* 212 Fed. 765 (C. C. N. D. Calif.)

Meanwhile in 1912 Respondents' predecessors had commenced proceedings in the Interior Department to secure a patent. By means of three separate mandamus suits requiring the performance of various ministerial duties, the last of which went to the Circuit Court of Appeals for the District of Columbia (*Work* v. *United States ex rel O'Donnell,* 23 F. (2d) 136) Respondents finally, in 1928, secured the issuance of a patent to California under the Swamp Land Act. It is this patent together with a patent from California to Darlington, Respondents' predecessor, that the United States seeks to cancel by this proceeding.

Two principal issues marked the trial of the instant case in the District Court. One was whether the lands in controversy were covered by the purported Mexican grant. If not, of course, the title asserted by the

[3] It is interesting to note that in this case Castro testified that he never signed the conveyance to Frisbie and Simmons under which the United States now claims title, but that on the contrary his name was forged thereto. 30 Fed. at pp. 576-577.

United States completely fails and the lands were properly patented to California. The other was, assuming that the Mexican grant covered the lands in controversy, whether the Mexican grant was established as against respondents by the introduction of the record of a proceeding brought for confirmation of the grant before the Board of Land Commissioners, and on appeal before the United States District Court. It is clear, and it is not argued to the contrary in the brief for the Government, that unless the confirmation proceedings are *res judicata* and binding on respondents as to the existence, validity, and extent of the Mexican grant, the asserted title of the United States has not been and cannot be established.

The District Court found in favor of the Government without writing an opinion. The majority of the Circuit Court of Appeals, after a detailed examination of the case and consideration of briefs filed both on original argument and on rehearing, held that the proceeding for the confirmation of the Mexican grant was not *res judicata* on respondents and did not establish the title of the Government to this property and reversed the decree of the District Court.

The principal issues remain the same in this Court. However, two additional contentions are raised by the Government, one being that it has acquired title by adverse possession, and the other being that the Swamp Land Act had no application to the land in controversy because the land was assertedly claimed under a Mexican grant in 1850.

II.

The Mexican Grant Did Not Cover the Land in Controversy.

A. The grant ran only to the point of highest high tide.

The purported grant by Mexican Governor Alvarado to Castro, upon which the United States now relies, was of "an adjacent island in the Bay of San Francisco called 'Mare Island' ". (R. 248.) This grant did not, we submit, cover the swamp lands north of Mare Island which are here in controversy.

In the Appendix to this brief we have reproduced the relevant portion of a number of maps, extending from the year 1827 to the year 1926, which were introduced into evidence by the Government in this case and which are before this Court as original exhibits. (See footnote 1, *supra,* p. 4.) These maps show Mare Island as a compact, hilly body of land of 2 or 2½ miles in length, surrounded on all sides by water except as joined on the north by a narrow neck of swamp land. From this narrow neck, swamp land gradually extends out fanwise for many miles to the northwest. The tract here in controversy extends from the bank marking the northern end of Mare Island some distance into the fanwise extension.

The swamp lands north of Mare Island were, in the period of 1840 to 1860, at about the elevation of mean high water, it being a disputed point between the parties to this proceeding whether, on the evidence in the record, they were slightly below or slightly above that mark. (R. 600, 815.) The evidence all agrees, however, that they were overflowed by the tides several times a month (R. 803-805, 815), and were entirely be-

low the line of highest regular high tide (R. 622-627, 792; Pltffs. Ex. KK, original).

It is the contention of the United States in this case that by granting Mare Island, Governor Alvarado also granted all swamp land north of the Island to a point where cut off by navigable water or at least by the line of ordinary high tide. Under its claim that the swamp lands are slightly above ordinary high tide, the United States asserts title to all the swamp lands lying between Mare Island and a series of connecting sloughs which have been found to cross the fanwise extension of swamp lands some 7½ miles north of the Island. Included in the area thus claimed is all of Survey "34" and a large part of Survey "569".

Among the maps before this Court as original exhibits are a number covering the period from 1827 to 1849 which are among those reproduced in the appendix to this brief (*infra,* pp. 110-115). These indicate the nature of the Island as it was known in 1841 at the time of the purported grant to Castro. We invite the Court's particular attention to the fact that these maps show no water course crossing the swamp land at any point north of Mare Island. In other words, it may be taken from these maps that in 1841 the swamp lands were thought to stretch without a break from the narrow neck which adjoined Mare Island until they met the high lands of California in the upper reaches of Sonoma Creek. Even Ringgold who surveyed this area in 1850 was uncertain as to whether any water-course crossed this swamp as may be seen by comparing two of his maps. (Pltffs. Exs. L11 and L13, reproduced App. *infra,* pp. 114-115.)

By reason of the fact that in 1841 no water-course was known to cross the swamp, it is obvious that had the grant of Mare Island been intended by Governor Alvarado to extend to ordinary high tide, the grant could not have been of an island because, using ordinary high tide as a boundary and accepting the contention of the United States that the swamp lands were above that mark, what is now known as Mare Island would have been simply the end of an unbroken peninsula. Boundaries must have been intended by Governor Alvarado entirely different from the boundary of ordinary high tide now proposed by the United States, and the nature of the boundaries actually intended is clear when we consider the rules of the civil law which were in force in Mexico at the time of the grant.

Under the civil law, the boundary between the seashore, which is public, and the upland, which passes under private grants, is not the line of ordinary high tide but is the line reached by the highest tide during the year. *Borax Consolidated* v. *City of Los Angeles,* 296 U. S. 10, 22; *Lux* v. *Hagin,* 69 Cal. 255, 315-333, 10 Pac. 674; 25 Ops. A. G. 172, 174; Hall's Mexican Laws, (ed. 1885), sec. 1466; Sherman, Epitome of Roman Law, sec. 82; Hunter, Roman Law, (3rd ed.), p. 310; Partida III, tit. 28, law 4, (Scott's Translation, 1931); Bouviers Law Dictionary, "seashore". In the case first cited Mr. Chief Justice Hughes, delivering the opinion of this Court, said (p. 22): " * * * by the civil law the shore extends as far as the high waves reach in winter. * * * " This Court, of course, will

in this proceeding take judicial notice of the Mexican Law. *United States* v. *Chaves,* 159 U. S. 452.

A grant of uplands bordering on tidal water conveys, under civil law, no title to this seashore between low tide and the highest annual high tide. Colquhoun, Roman Civil Law, (1851), secs. 922, 923; Chamier, Roman Law, (1893), p. 79; Hunter, op. cit. The Institutes of Justinian and the Partidas class the seashore among those things which are by natural law common property of all people. Lib. 2, Tit. 1, Sec. 1; Partida III, op. cit. See also *Lux* v. *Hagin, supra;* Hall's Mexican Laws, op. cit.. The decisions of this Court in *Costas* v. *Insular Government,* 221 U. S. 623 and *United States* v. *Coronado Beach Co.,* 255 U. S. 472, are not to the contrary, since those cases merely held that under civil law a direct and specific grant by the sovereign of the seashore itself would be valid.

As we have heretofore pointed out, even the Government's evidence in this case establishes that the lands here in controversy were overflowed by the tides several times a month. (*Supra,* pp 31-32). At such times the tides reached to the bank at the northern end of Mare Island which was the dividing line between the uplands owned by the United States and the swamp lands to which Respondents hold title. Under the law in force in Mexico at the time, then, the grant of Mare Island conveyed to Castro only the land to this point of highest high tide. It is evident that no title to the land now in controversy passed under that grant.

Not only is this conclusion required by the Mexican law but also the same conclusion would follow even if

the law were less clear. From the surrounding circumstances it is to be inferred, we think, that Mare Island was understood at the time to include only the highlands and that no more than that was intended to be granted by Alvarado.

In addition to the fact that, unless it terminated at the edge of the highland, Mare Island would not have been considered an island in 1841, of particular significance is the testimony of Mariano G. Vallejo, a witness for the claimants in the proceeding brought for the confirmation of the Castro grant. Vallejo was a lawyer, one of the leading citizens of California at the time, and had lived in the immediate vicinity of this island for many years. His testimony was that Mare Island was some 2½ miles in length and contained about ½ league of land, a little more or less. (R. 237-238.) Vallejo's estimate of the length of the island when applied to the uplands only, including none of the swamp lands north of the island, was approximately correct. His estimate of area, applied in the same manner, also was surprisingly close. A half league square of land in California is about 1085 acres. *United States* v. *Perot,* 98 U. S. 428, 432. The actual area of Mare Island not including any of the swamp land north of the Island is 897 acres. (R. 456.) It is obvious that Vallejo believed Mare Island as granted to Castro included only the highlands and that the boundaries of the island were at the line of highest high tide. Certainly it could not be contended that he believed Mare Island to extend to the limits urged by the United States which would produce an island 10 miles in length and 5227 acres in area. (R. 486, 579.)

As further indication that in those early days the Island was generally supposed to include only the highlands, the report of the Sloat Board on November 6, 1852, should be considered. That Board reported that the whole length of the Island was about two miles and that it contained about 900 acres. (R. 357.) They further state that they had made a careful survey of the Island and that this survey was shown on plat no. 7 being sent with the report. (R. 351.) The Island as shown on this plat consisted only of the highlands and did not include any of the swamp lands lying to the north. (R. 842-843.) The force of this evidence is in no wise shaken by the fact that the following December, in answer to an inquiry as to the value of the lands from the Secretary of the Navy, who was negotiating a purchase from the land speculators who, having bought Castro's title, were claiming and proposing to sell under it not only the uplands but also an undelimited amount of swamp lands, the Sloat Board states that the Island includes about 900 acres "in addition to a large tract of tule extending toward Napa and Sonoma". (R. 324-325.) The inference is clear that the Board still was of its original opinion that the Island itself consisted of the uplands, but felt called upon to express its opinion on the value of that which was claimed by the speculators.

In addition there is the fact that the early maps which named Mare Island all centered the name on the highlands in such a way as to preclude the possibility that the swamp lands were understood to be part of the Island. (See Pltffs. Exs. L 11, L 12, L 17, and L 25,

reproduced App. *infra* pp. 114-117. Also see Pltffs. Exs. L 10, L 13b, L 16, and L 18, original.)

We submit that, when made, the purported Mexican grant of Mare Island conveyed no title to the land in controversy and that unless it be found that the limits of the grant have been subsequently extended, the title asserted by the United States in this proceeding completely fails and Survey "34" was properly patented to Respondents.

B. Original limits of the grant were not extended by the confirmation proceedings.

The only possible source from which it might be urged that the area originally purportedly granted by Governor Alvarado to Castro has been extended is the proceeding brought for the confirmation of the Castro grant. Upon consideration, however, it is clear that the confirmation proceeding has had no such result.

In the first place the confirmation proceeding is not binding on, and cannot be used as evidence against, Respondents, for the reason that the United States, while apparently resisting the Mexican claim, purchased and actively supported that claim. This matter will not be elaborated here since it is considered at length later (*infra* pp. 45-70) in connection with the lack of proof of the existence of a valid Mexican grant. However, this fact is here equally fatal to the position of the Government, since, as we have shown, the grant, unless extended in some way by later proceedings, did not cover Survey "34".

Even if we were incorrect in our position that the Government cannot rely on the confirmation proceed-

ing against Respondents, however, and it were thought that the confirmation proceeding could be considered here to determine whether the Mexican grant had been extended, the result would be the same. No enlargement of the limits of the grant has been accomplished by that proceeding.

The purpose of the consideration of Mexican grants by the Board of Land Commissioners and the courts should be carefully borne in mind in this connection. That purpose was not to make new grants of land but was merely to confirm what had already been granted. The spirit of the Treaty of Guadalupe Hidalgo and, indeed, the principles of International Law, contemplated that land held in private ownership at the time of the cession should be respected. But this applies only to the rights then held; it does not imply that the United States was to make any addition to those rights and the cession in no way increased those rights. *Ely's Administrator* v. *United States,* 171 U. S. 220, 239.

In providing a procedure for passing on Mexican claims, Congress did not empower the Commission to dispose of land or to initiate titles. The Board of Land Commissioners and the courts were merely to determine and confirm the rights as they existed prior to the cession. A confirmation decree is simply declaratory of those rights and is not to be construed as extending them in any sense *Henshaw* v. *Bissell,* 85 U. S. 255; *Ely's Administrator* v. *United States, supra; Los Angeles Milling Co.* v. *Los Angeles,* 217 U. S. 217; *Boquillas Land and Cattle Co.* v. *Curtis,* 213 U. S. 339. Cf. *United States* v. *Levy,* 13 Pet. 81; *United States* v.

D'Auterieve, 15 How. 13. If, for example, in any case there had been a delivery of juridical possession by the Mexican officials, the boundaries set at the time of that delivery must be followed by the Surveyor General in surveying the land under the confirmation decree, in the absence of some provision in the decree clearly requiring some other result. *Graham* v. *United States,* 4 Wall. 259; *Van Reynegan* v. *Bolton,* 95 U. S. 33.

Since the purpose of a decree of confirmation is but to confirm the rights which existed prior to the cession, such a decree should not be interpreted in a way that would extend those rights unless clearly and unavoidably required by the language of the decree.

Tested by this rule of construction, the proceeding brought for the confirmation of the Castro grant in no way extends the rights which passed under Mexican law. The decree of the Board of Land Commissioners states that the place "being an island is bounded by the water's edge". (R. 280.) Not only does this in no way compel the construction that it was intended or operated to enlarge the original grant, it does not even indicate such a result. From the records which are left to us by the Board, it does not appear that any maps were presented in connection with the proceeding. The Board, therefore, could not have had in mind any peculiarities of this particular Island and it is obvious that it was merely expressing the general rule of both civil and common law that the water's edge is the boundary. Nothing in the opinion suggests the particular tides to be used in determining the water's edge. It is significant in this connection that in at least one case where the Board intended ordinary high tide to be the bound-

ary, it used those specific words. *Knight* v. *United States Land Association,* 142 U. S. 161. The inference may be drawn that by the phrase "water's edge" a different line was meant.

Nor is any other meaning to be derived from the *nunc pro tunc* decree of the District Court if that may be looked to at all in this proceeding. That decree purports to confirm title to Mare Island "with its natural boundaries". (R. 290.)

Treating these decrees, then, as fully operative and entitled to be considered in the present litigation, we submit it to be clear that they may not be relied upon as enlarging the Castro grant. They contain no language which would overthrow the presumption that they were intended merely to confirm the grant and not to enlarge it.

Furthermore there exists another ground upon which it is to be held that the confirmation decrees did not enlarge the grant. This is the principle that a confirmation of a claim to land in California under a Mexican grant is limited by the extent of the claim made and the decree of confirmation cannot be used to maintain title to land not claimed. *Brown* v. *Brockett,* 88 U. S. 387; *Williams* v. *United States,* 92 U. S. (2 Otto) 457. The original petition of Bissell and Aspinwall before the Board of Land Commissioners merely claimed in general terms an island called "Isla de la Yegua". (R. 220-222.) The claimants' only witness as to the size of this Island, Mariano Vallejo, testified that it was about 2½ miles long and contained about ½ a league, more or less. (R. 237-238.) This, as we have pointed out (*supra* p. 35) would restrict the Island

to the highlands. Claimants put no other witnesses on as to size or boundaries nor did they challenge in any way the accuracy of the statement of their witness, Vallejo. It is obvious that in confirming Mare Island, the Board of Land Commissioners must have believed they were confirming an island approximately 2½ miles long and containing about ½ a league of land.

Before the District Court, claimants made it even more clear that they were asking confirmation only of the Island as described by Vallejo. They filed in the District Court a paper entitled "Index of Case". (Pltffs. Ex. C, original.) This index was headed by the following language: "Claim of G. W. P. Bissell and William H. Aspinwall to Mare Island, about ½ a league, in Sonoma County."

The claim presented to the Board of Land Commissioners and the District Court was, therefore, a claim to an island about 2½ miles long, containing about ½ league of land. When now the Government contends that the confirmation gives it title to an island four times as long and five times as large, it runs squarely into the rule of the above cited cases to the effect that they are entitled to no more than they claimed in the confirmation proceeding.

It may be that the Government, in attempting to answer our argument that the confirmation proceeding did not enlarge the Mexican grant, will suggest that the survey made by Freeman in 1877 determined that the land in controversy was covered by the confirmation decree. On the contrary, however, we believe it clear that the Freeman survey is not effective for any purpose whatsoever and that if evidentiary in this pro-

ceeding at all it supports the position of Respondents.

The Freeman survey was ordered on July 19, 1877 by H. G. Rollins, the United States Surveyor General for California. (R. 563-565.) Freeman completed the survey on August 1, 1877 and in it he included about 7½ miles of the swamp land north of Mare Island. (R. 711-720.) Notice of the Freeman survey was published by Rollins' successor, General Ames, in two newspapers, the first publication being on October 11, 1877, and the last one November 8, 1877. (R. 709-710.) On November 5, 1877, before the final publication, General Ames forwarded to the General Land Office a tracing for the account and also the account of Freeman in the sum of $404.94 for payment. (R. 700-701.) On January 18, 1878, General Ames executed a certificate to the effect that notice of the Freeman survey had been published as required by the Act of July 1, 1864. (R. 709-710.) Nothing more was done with regard to this survey until July 25, 1879 when the Commissioner of the General Land Office wrote to Theodore Wagner, the successor of Ames, asking whether the Island had been surveyed. (R. 732-733.) In response to this inquiry Wagner forwarded a copy of the plat of survey and field notes together with a protest which had theretofore been filed by the attorneys for Respondents' predecessors, and stated that he considered the survey incorrect in that it not only included tracts which are properly islands in themselves but also embraced a large quantity of tide land, and stated that the survey should have been limited to the area contained south of a line run across the island from the vicinity of station No. 54 to station No. 138. (R.

593-594.) The line so run would be at about the point where the highlands of Mare Island stopped at the north and would exclude the land here in controversy. No further steps were taken with regard to this survey either by the General Land Office or by the office of the Surveyor General.

The Act of July 1, 1864 (13 Stat. 332) above referred to, which was the statute under which the survey was made, expressly requires the approval of the survey by the Commissioner of the General Land Office and his endorsement on the survey of a certificate of his approval. Under this Act a survey had no official standing and was inoperative for any purpose until so approved. *Van Reynegan* v. *Bolton,* 95 U. S. 33; *McCreery* v. *Haskell,* 119 U. S. 327; *Frasher* v. *O'Conner,* 115 U. S. 102; *United States* v. *Hancock,* 30 Fed. 851; *Duncanson* v. *S. P. R. R. Co.,* 12 L. D. 664; 14 Ops. A. G. 74.

That the Freeman survey did not receive the express approval of the Commissioner of the General Land Office as required by the statute will not, we think, be denied by the Government. However, the Government contended below that the survey had been approved by implication because of later acts of the Secretary of the Interior. We submit that the express requirement of the statute that the approval of the Commissioner of the General Land Office be endorsed on the survey is not satisfied by an implied approval even if established. *Tubbs* v. *Wilhoit,* 138 U. S. 134, is in no way to the contrary since that case dealt with an entirely different statute which did not require the Commissioner to endorse his approval upon the survey. Nevertheless, the

record here in no way countenances an assertion that there has been any implied approval of the Freeman survey. The only material in the record to which the Government points in this regard is a letter dated September 22, 1905 from the Commissioner of the General Land Office to the Secretary of the Interior with regard to a request of the Navy Department for a survey of Mare Island. (R. 736-744.) This letter itself indicates clearly that the Freeman survey was never approved. The letter states (R. 738) that Mare Island is unsurveyed. Also, the letter goes on to recite the facts with regard to the Freeman survey and states that upon receipt of the survey from Wagner by the General Land Office no further action was taken and the letter was merely placed on file in the office. The reason why no further action was taken is stated to be because the United States purchased the Island from Bissell, Aspinwall and McArthur, based upon the survey executed by the Board of Officers of the United States, which survey was deemed sufficient for the purpose of conveying the land. (R. 743.)[4] Certainly there is in the letter nothing to support an allegation that the Freeman survey has in any way been acted upon by the Interior Department so as to give it approval. In fact we have the certificate of the Acting Assistant Commissioner of the General Land Office, executed in 1927, that the survey was unaccepted. (Pltffs. Ex. J, p. 58, original. See also pp. 46-47 of the same exhibit.)

We submit, therefore, that the purported grant of Mare Island to Castro, limited when made by the Mexi-

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[4] As we have already pointed out, this survey showed the Island as including only the highlands. (R. 842-843.)

can law to the area above the line of highest high tide, has not been in any way enlarged by the Land Commission proceedings. The swamp lands north of Mare Island passed to the United States by the cession and were properly patented to California under the Swamp Land Act.

III.

The Mexican Grant Has Not Been Established.

A. Confirmation proceeding is not res judicata.

If for any reason it be thought that the purported Castro grant extended to the land in controversy, still it is incumbent upon the United States to prove by proper evidence in this case the existence and validity of that grant before the United States can secure cancellation of Respondents' patents on the ground that the land had previously passed thereunder. Patents issued by the Government are solemn documents not to be cancelled lightly on hypothesis or inference. This Court has often stated that before a patent will be cancelled the United States must produce evidence which is unequivocal, which commands respect and which produces conviction. Cancellation cannot be had upon a bare preponderance of the evidence which leaves the issue in doubt. *Maxwell Land Grant Case,* 121 U. S. 325; *United States* v. *Stinson,* 197 U. S. 200; *Wright-Blodgett Co.* v. *United States,* 236 U. S. 397.

To prove the existence and validity of the Castro grant under which it claims, the United States in the District Court offered in evidence a transcript of the record of a proceeding brought for the confirmation of that grant. Some contention was made by the Govern-

ment in the Circuit Court of Appeals to the effect that proof had been made of the existence and validity of this grant independently of the confirmation proceeding. The Circuit Court of Appeals held to the contrary, however, and the contention is not repeated in the Government's brief in this Court, either by way of specification of error or argument. Indeed when the conclusive evidence against the validity of the Castro grant presented by the Government in *Bouldin* v. *Phelps, supra,* is considered, it is not difficult to see why the Government does not contend that it has an inherently good title. Whether or not the Castro grant has here been established, then, rests entirely on the effect of the confirmation proceeding.

The United States contends that the confirmation proceeding is conclusive upon Respondents as a binding adjudication of the existence and validity of the Castro grant. The assertion is that because the title of Respondents is derived from the United States, Respondents were represented by the United States in the confirmation proceeding and are bound by the result. That proceeding was brought before the Board of Land Commissioners and, on appeal, before the District Court, in accordance with the Act of March 3, 1851, C. 41, 9 Stat. 631 (App. *infra* pp. 96-104), which provides for a law agent to defend the claims on behalf of the United States and provides (Sec. 15) that final decrees shall be conclusive between the United States and the claimants only, and shall not affect the interests of third persons.

It is not our contention that Respondents are within the term "third persons" as there used and thus within

the exception made by the act itself, for we fully recognize that in the ordinary case a confirmation decree under the Act of 1851 is binding on those who claim under the United States. *Beard* v. *Federy,* 70 U. S. (3 Wall.) 478; *More* v. *Steinbach,* 127 U. S. 70; *Knight* v. *United States Land Association,* 142 U. S. 161. But this is no ordinary case of collateral attack. This is a case requiring, as we believe, application of the well settled principle that no matter how conclusive and binding an adjudication normally may be, it will not be *res judicata* on innocent persons where, by reason of the acts of one or more of the parties, the proceeding was fictitious and collusive and lacked the safeguards which are normally sufficient to insure a fair and correct determination of the issue. It appears to be the attitude of the Government (br. 35) that we are merely attempting to expand the meaning of the statutory phrase "third person". On the contrary, the principle upon which we rely is not bottomed upon any particular statute but is a general rule of equity applicable alike to all proceedings which are alleged to conclude the rights of persons not parties thereto.

Certainly the right of Respondents to a consideration of whether, on the facts of this particular case, they are entitled to the protection of this deeply rooted and salutary principle is not to be defeated by any plea concerning the importance of the sanctity and finality of Land Commission Decrees generally. California land titles are here in no way threatened. The application of basic equitable principles sought by Respondents goes no further than the facts of this case. In no instance other than Mare Island, that we know of, did

the United States purchase a Mexican claim and carry on a fictitious controversy with itself for the purpose of foreclosing the rights of its prior grantees. That is, as we shall develop, what has taken place here, and we urge that a court of equity will in no case permit the desirability of certainty with regard to land titles to foreclose consideration of the rights of the parties in a situation of this sort.

1. The Confirmation Proceeding was Collusive and Non Adversary.

Bissell and Aspinwall filed with the Board of Land Commissioners on August 31, 1852 their claim for confirmation of Mare Island under the Castro grant. (R. 220-222.) Even before that time they had been carrying on negotiations for the sale of the property to the United States (R. 367-372), and this sale was consummated on January 4, 1853 by the delivery to the United States of a quit claim deed to the property (R. 302-308).

By this conveyance the United States became the owner of the claim and the real party in interest in the proceeding for its confirmation. At this time no steps other than the filing of the petition had been taken in the confirmation proceeding nor was anything done in the proceeding until April 20, 1854. (R. 218.) The testimony presented to the Board consisted entirely of depositions and at the time all of the depositions were taken and at all times thereafter, the United States was not only the defendant in the case but was also the owner of the rights asserted by the plaintiffs.

The Board entered its decree of confirmation on May 8, 1855, from which an appeal was perfected to the District Court. (R. 277-283.) On March 2, 1857, upon a written representation by counsel for claimants that since the United States had purchased the claim and the rights thereunder inured to its benefit, there was no objection to confirmation (Pltffs. Ex. C, original) and "by consent of the United States District Attorney", the District Court made a minute order for a decree affirming the decision of the Board. (R. 566-567.) No judgment or decree, however, was signed at that time, but over 73 years later, on April 15, 1930, upon an *ex parte* application by the *United States* the Court entered a judgment and decree *nunc pro tunc* confirming the decree of the Board. (R. 289-291.) The *nunc pro tunc* decree recites on its face that the rights of the claimants had been acquired by the United States. (R. 290.)

It is apparent from these facts that, shortly after the proceeding before the Board of Land Commissioners was initiated and before any hearing or decision, there ceased to be any controversy. From then on there were no adversary proceedings—the Government owned and controlled both sides of the case—and the Government was, both in fact and in law, attempting to carry on litigation against itself. A judgment in form so procured is in the eyes of the law no judgment of the court, but is a nullity and cannot be controlling on innocent parties in subsequent litigation no matter how binding the judgment would have been if arrived at in an adversary proceeding.

The leading authority on the principles to which we advert is *Lord* v. *Veazie,* 49 U. S. (8 How.) 250. It was there shown to this Court that the plaintiff and defendant rather than being real adversaries had a common interest in the proceeding opposed to that of other persons who were not parties to the suit. Chief Justice Taney, dismissing the suit said (p. 255):

> A judgment entered under such circumstances, and for such purposes, is a mere form. The whole proceeding was in contempt of the court, and highly reprehensible, and the learned district judge, who was then holding the circuit court, undoubtedly suffered the judgment *pro formâ* to be entered under the impression that there was in fact a controversy between the plaintiff and defendant, and that they were proceeding to obtain a decision upon a disputed question of law, in which they had adverse interests. *A judgment in form, thus procured, in the eye of the law is no judgment of the court. It is a nullity, and no writ of error will lie upon it.* * * * (Emphasis supplied)

The order of dismissal entered by the Court upon the basis of Chief Justice Taney's opinion recited that the judgment was a *nullity* and *void.* 49 U. S. at pp. 255, 256.

This same rule has been applied by this Court specifically to cases where, while the suit is pending, one party becomes the equitable owner of the opposing interest. *Cleveland* v. *Chamberlain,* 66 U. S. (1 Black) 419; *Wood Paper Co.* v. *Heft,* 75 U. S. (8 Wall.) 333. Indeed it may safely be said that whenever it has appeared that the party on one side of a case had any in-

terest in or control over the opposing side, this Court has applied the principle that any purported judgment entered in such a case would be a nullity and void. *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300; *Hatfield* v. *King*, 184 U. S. 162; *Gardner* v. *Goodyear, Dental Vulcanite Co.*, 131 U. S. appendix C-111; *Tennessee, etc. Railroad Co.* v. *Southern Telegraph Co.*, 125 U. S. 695; *Gaines* v. *Relp*, 53 U. S. (12 How.) 472, 537-539; *Gaines* v. *Henner*, 65 U. S. (24 How.) 553, 628-629.

So reprehensible is a proceeding where one party is in control of both sides that this Court has indicated that the carrying on of such litigation is punishable contempt of court. *Lord* v. *Veazie, supra; Cleveland* v. *Chamberlain, supra; Hatfield* v. *King, supra.*

Particularly has this Court condemned the carrying on of such non-adversary litigation for the purpose of attempting to prejudice the interests of third parties. *Lord* v. *Veazie, supra; Cleveland* v. *Chamberlain, supra.* Exactly this was the purpose of the United States in the confirmation proceeding as is clearly to be inferred from the *nunc pro tunc* decree submitted by the United States and signed by the same District Judge that tried the instant case. This decree recites (R. 290):

> AND IT FURTHER APPEARING, that all the right, title and interest of the Appellees herein in and to the said claim, have passed to and have been acquired by the United States, the Appellant herein, by purchase from the said Appellees, *and that all persons claiming by, under, or through the Appellants or the Appellees or any of them, are*

> *chargeable with notice of this action and of everything that has been done therein, and therefore, that no rights of third persons have intervened or could intervene.* (Emphasis supplied.)

This language purporting expressly to terminate the rights of all other persons in the property was of course not necessary to the mere entry *nunc pro tunc* of a decree affirming the decision of the Board of Land Commissioners. The insertion of this language was an attempt to foreclose rights of other persons not parties to the proceeding and demonstrates the motivating purpose behind the efforts of the United States to secure the entry of a decree against itself. When it is considered that the proceeding drifted without a final decree for 73 years, during which time the United States itself took advantage of the fact that it had not yet terminated (see *Bouldin* v. *Phelps, supra,* at p. 578) the application for this *nunc pro tunc* decree immediately after the patent had been granted to Respondents indicates that the Land Commission proceeding was important to the United States only insofar as it might conclude and bar Respondents' rights. It is, in fact, apparent that this was the only benefit which the United States could possibly derive from the *nunc pro tunc* decree and the Government does not, in its brief, suggest anything to the contrary.

The opinion of this Court in *Lord* v. *Veazie* is so applicable to these facts as to warrant quotation of the following passages therefrom (49 U. S. at p. 254):

> On the contrary, it is evident that their interest in the question brought here for decision is one and

the same, and not adverse; and that in these proceedings the plaintiff and defendant are attempting to procure the opinion of this court upon a question of law, in the decision of which they have a common interest opposed to that of other persons, who are not parties to this suit, who had no knowledge of it while it was pending in the circuit court, and no opportunity of being heard there in defence of their rights. And their conduct is the more objectionable, because they have brought up the question upon a statement of facts agreed on between themselves, without the knowledge of the parties with whom they were in truth in dispute, and upon a judgment *pro forma* entered by their mutual consent, without any actual judicial decision by the court. It is a question, too, in which it appears that property to a very large amount is involved, the right to which depends on its decision.

A decree which, as held in the above cited cases, is null and void because given in a proceeding in which the same party was both equitable plaintiff and actual defendant, obviously cannot be urged as conclusive upon the rights of innocent persons, and to this effect have been the decisions of this Court. *Andes* v. *Ely,* 158 U. S. 312; *Michaels* v. *Post,* 88 U. S. 398, 426; *Cochrane* v. *Deener,* 95 U. S. 355. In the first cited case the validity of a municipal bond issue was reexamined although the bonds had previously been held valid in an action against the Town on an interest coupon owned by the Town. In the last cited case this Court had previously held certain patents to be valid but when later it was shown that the parties to the suit had, prior to argument, concluded some sort of a conditional

agreement whereby the controversy was no longer really adversary, this Court stated that other parties should not be concluded from having a hearing on the validity of the patents whenever their cases were presented.

This is but an application of the general principle of *res judicata* that whenever, by reason of something done by a party to the proceeding, there was no adversary trial or decision of the issue in the case, the decision does not prevent a reconsideration of that issue at the instance of innocent persons in a subsequent action. *United States* v. *Throckmorton,* 98 U. S. 61; *Johnson* v. *Waters,* 111 U. S. 640; *Michaels* v. *Post, supra.*

The attempted distinction of *Lord* v. *Veazie* and *Cleveland* v. *Chamberlain* in the Government's brief (footnote 28 p. 71), to the effect that those cases do not apply to proceedings which are non-adversary where the Court is advised of the fact and nevertheless proceeds to a decree, is without merit. If, as this Court has held, the action of parties in presenting such a case is a reprehensible, punishable contempt, then certainly the action of a judge in entering a decree in such a case when advised of the facts is an abuse of the judicial function. Irrespective of this, however, the decisions in *Lord* v. *Veazie* and *Cleveland* v. *Chamberlain* were to the effect not only that this Court would not entertain such a proceeding but also that any decree entered in such a proceeding was *null* and *void.*

Two arguments are made by the Government in its attempt to avoid the application of the principles we are now discussing. One is that even though the United States was the owner of the claim sought to be

confirmed, the United States actually contested the claim and, therefore, there was a genuine controversy. (Govt's. br. pp. 45-52, 66-67.) The second is that even though there were no adversary proceeding and even though the decree of the District Court were, consequently, not *res judicata,* still the decree of the Board of Land Commissioners is binding because the proceedings before that Board were not meant to be adversary. (Govt's. br. pp. 67-70.) In other words this second contention is that the ordinary rules of *res judicata* with regard to collusive and non-adversary suits have no application to proceedings before the Board.

(1) We might answer the first contention by simply pointing out that when it appears that a proceeding was not between parties whose interests were opposed, the court will not go back of that fact and attempt to evaluate the efforts which were put forth by the parties to determine whether the proceeding was, in fact, completely and fairly tried. Obviously, the Court would be in no position to determine what showing could have been made in the case if the interests had been adverse. In the case of *Cleveland* v. *Chamberlain, supra,* the defendant did not purchase the plaintiff's rights until after the case had been tried below and this Court found that until that purchase the case had been prosecuted with vigor, yet this Court dismissed the case as being non-adversary.

However, we prefer flatly to meet the Government on its assertion that the United States actually and vigorously contested the confirmation of the grant throughout the proceeding. The record speaks elo-

quently to the contrary, in our opinion. Most of the argument on this point in the Government's brief is to the effect that the Government officers acted in good faith and had some incentive to offer a defense to the claim. The fact that the officers had good motives, however, cannot prove that they actually and continuously contested the claim when the record establishes the contrary.

A reading of the testimony presented to the Board (R. 222-247) will indicate, we believe, that the defense to this claim was only half heartedly conducted. Certainly this must be the conclusion when that defense is compared with the case made against the grant by the Government in *Bouldin* v. *Phelps, supra,* when the Government was really vitally interested in defeating the grant. But the actual attitude of the Government in the confirmation proceeding is most clearly indicated after the case reached the District Court. There the counsel appearing in behalf of the claim filed a paper entitled "Index of the Case" which was, it would seem, a summary of the facts made for the convenience of the District Court. (Pltffs. Ex. C, original.) At the end of this index is the following statement:

> The United States being now the owner of the titles of appellees, a confirmation of this claim inures to the benefit of the Government and no objection is therefore made to a decree in favor of the validity of the claim.

In no way this statement denied by the United States Attorney. On the contrary we find in the minutes of

the Court for March 2, 1857 an entry that a decree of confirmation was entered "by consent of the United States District Attorney". (R. 567.)

How it can be argued in the face of these facts that the United States continued to contest the claim even though it had purchased it, we fail to see. If there had been an actual contest by the United States and the case had been tried *de novo* in the District Court as contemplated by the statute, the result might have been quite different. The decision of the Board was delivered before the widespread extent of fraudulent land claims in California was known and before the Archives of the Mexican Government in California were collected so as to present a reliable base for decision. *Cummings and McFarland, Federal Justice,* pp. 134-139. Castro claimed to have received a grant from Alvarado to another island in San Francisco Bay and this claim was also confirmed by the Board. On appeal, however, the Government not having purchased that grant, actively contested it. Upon trial before the District Court in 1858, the Board was reversed, despite positive testimony by Alvarado that he made the grant. The District Court held that the absence of a record of any final grant in the Archives, a condition also existing in the case of Mare Island, was determinative against the grant. *United States* v. *Pollack,* 1 Hoffman Land Cases 284.

Furthermore the assertion that the United States actually contested this claim is conclusively answered, we submit, by the action of the United States in securing the *nunc pro tunc* decree in 1930. No decree was actually signed or entered in 1857. Thereafter, 73 years

passed without further action in the case. During that period the status of this confirmation proceeding was mooted in at least two lawsuits and in each it was held that no final decree had been entered which could constitute estoppel or *res judicata*. *San Francisco Savings Union* v. *Irwin, supra; Bouldin* v. *Phelps, supra.* Then two years after the issuance of the patent to Survey "34" by the United States to California and just prior to the commencement of this suit, an *ex parte* application for a decree *nunc pro tunc* was made, not by counsel for the claimants but by the United States District Attorney. (R. 289-291.) We submit that if the United States was actually and in good faith contesting a proceeding it would not have applied for and secured such a *nunc pro tunc* decree against itself. No advantage accrued to the United States from so doing except insofar as it might benefit the United States *as owner of the confirmed claim* against the rights of parties claiming under the United States in its capacity of defendant. In other words, in securing the final decree in the confirmation proceeding the United States was *actively supporting* and *asserting* the claim which the United States as defendant was supposed to be contesting.

When these facts are considered one may well question even the good intentions of the Government officers upon which the United States so strongly relies. Attorney General Cushing, with his sound judgment and insight, foresaw that the United States could not properly neglect to contest the proceeding strongly at every stage (8 Ops. A. G. 443), but his warning was soon forgotten. The rights which the United States

had under the bond given by Aspinwall (R. 308-312), of which the Government seeks to make so much (br. 47), do not seem to have been sufficient to persuade the Government officers that they had more to gain from defeating the claim than from securing its confirmation. And even as a matter of law, irrespective of the actual subsequent conduct of the proceeding, this bond was not sufficient to prevent the proceedings from becoming non-adversary upon purchase of the claim by the United States. In *Wood Paper Co.* v. *Heft*, 75 U. S. (8 Wall) 333, suit was brought for infringement of a patent and during the proceeding a settlement was effect whereby the rights of plaintiffs and defendants were joined and merged into one corporation. The question of damages for previous infringements was, however, not settled. This Court held that the suit became non-adversary in spite of the still remaining question of damages.

The implication in the Government's brief (p. 51) that California consented to the loss of her rights in the land in controversy by the Act of May 11, 1854 (Cal. Statutes, 1854-55, C. 43, p. 48, App. *infra* pp. 105-107) is without basis in fact. That Act carefully and clearly specifies that it applies only to lands south of a line drawn across the northern point of the Mare Island highlands. It indicates definitely, not that California consented to any loss of its rights in survey "34" by reason of the Castro grant, but on the contrary that both the United States and California agreed that survey "34" was not covered by the Castro grant and that California had good title thereto.

The fact is, therefore, that the confirmation proceeding was not only collusive and non-adversary in law but also in fact. We submit that the error in the position taken by the Government in its brief is based upon an assumption that the principles for which we now contend do not apply unless there is a showing that the Government was guilty of actual and intended fraud. Many of the cases we have cited above dealt with situations where the parties acted in perfect good faith, but this Court nevertheless found the cases to be collusive and non-adversary simply because of the fact that one person was the real party on both sides. The facts here bring the instant case squarely within this rule.

(2) The second contention of the Government, that even if the proceeding were non-adversary still the ordinary rules of *res judicata* relating to non-adversary proceedings do not apply to decrees of the Board of Land Commissioners, we believe to be adequately answered by the decision of this Court in *United States* v. *Throckmorton, supra.* That was a suit brought by the United States Attorney to set aside and have declared null and void a decree of the Board of Land Commissioners confirming a Mexican claim in California and a decree of the District Court affirming the decree of the Board. The ground was that the decrees were obtained by fraud. This Court held that no relief could be granted because the only fraud relied upon was *intrinsic* fraud, but stated that the result would be otherwise if the fraud were *extrinsic,* as, for example, if by reason of something done by a party there

were no adversary trial. In fact, one of the grounds relied upon in the case as showing fraud was the fact that the attorney representing the United States in the confirmation proceeding knew the claim was fraudulent but did not disclose this to the Board. This Court stated that *if it had been further shown that the attorney was then interested in the Mexican claim,* relief would have been granted. No distinction was made between the decree of the Board and the Decree of the District Court, the opinion being clear that relief from both decrees would lie in the case of extrinsic facts showing non-adversary proceedings.

It is too late in the day for the United States to assert that the proceedings set up by the Act of March 3, 1851 (App. *infra,* pp. 97-104) were non-adversary and non-judicial in character. This Court considered and passed upon the many appeals in these cases even in the face of challenges to the Court's jurisdiction on this very ground. *United States* v. *Ritchie,* 58 U. S. 524. And in considering these cases, this Court has repeatedly stated that the Act of 1851 required California land titles to undergo *judicial* examination, that the Board is a *judicial* body and that the Government is the party interested against petitioner in these cases. *Tameling* v. *United States Freehold, etc. Co.,* 93 U. S. 644; *United States* v. *Throckmorton, supra; Beard* v. *Federy,* 70 U. S. (3 Wall.) 478; *Southern P. R. Co.* v. *United States,* 200 U. S. 354, 358; *Knight* v. *United States Land Association,* 142 U. S. 161, 188; *Grisar* v. *McDowell,* 73 U. S. (6 Wall.) 363; *Botiller* v. *Dominguez,* 130 U. S. 238; *Thompson* v. *Los Angeles Farming, etc. Co.,* 180 U. S. 72. Cf. 7 Ops. A. G. 303. The

Board set up by the Act of 1851 is, in this respect, no different from the Court of Private Land claims established by the Act of 1891, which was a judicial body. *United States* v. *Coe,* 155 U. S. 76.

The Act of 1851 in providing for notice to the United States, for a law agent to represent the United States, for the taking of testimony on behalf of the United States and the presence of the law agent at the taking of all depositions, clearly contemplated an adversary proceedings with the safeguards attendant upon judicial procedure. The right of the United States to appeal to the District Court is most significant in this regard. It was, of course, competent for the Congress itself to determine the matters, but it was also competent for the Congress to set up judicial machinery for this purpose, which it did by the Act of 1851. The process set up being judicial in nature, it is to be governed by the rules ordinarily applicable to all judicial proceedings, among which is, as held by this Court in *United States* v. *Throckmorton,* the rule that the proceeding will not thereafter conclude the rights of others if it was collusive and non-adversary.

But even if the hearing before the Board of Land Commissioners were not judicial in nature, the Government here would not thereby become entitled to use the decree of the Board in the Bissell and Aspinwall case as binding on respondents. The case did not terminate with that decree but was appealed to the District Court where the proceeding was to be heard *de novo* in an ordinary judicial proceeding between adverse parties. *United States* v. *Ritchie, supra.* Such an appeal having been perfected, the force of the pro-

eding as *res judicata* must depend upon the effect the action of the District Court. The cases of *Keller Potomac Electric Co.*, 261 U. S. 428; *Radio Commis-on* v. *General Electric Co.*, 281 U. S. 464; *Postum ereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693; *Ex arte Bakelite Corp.*, 279 U. S. 438, do not hold other-se. They indicate that where an attempt by Act of ongress to confer jurisdiction on this Court fails be-use the proceedings dealt with by the Act do not volve a case or controversy, and it appears to have en the intention of Congress that the legislative urts should in that event continue to have jurisdic-n, they will be held to have such jurisdiction. The ses of *Schmertz Wire Glass Co.* v. *Western Glass Co.*, 8 Fed. 977 (C. C. N. D. Ill.), affirmed 185 Fed. 788 . C. A. 7), and *Colman* v. *Hathaway*, 285 Fed. 602 . C. Mass.), cited on p. 71 of the Government's brief e similar since they involved administrative proceed-gs dealing with the granting of patents which might her be *ex parte* or contested. Cf. *Gandy* v. *Marble*, 2 U. S. 432; *Appert* v. *Brownsville Plate Glass Co.*, 4 Fed. 115, (C. C. W. D. Penna.); *Schmertz Wire ass Co.* v. *Pittsburgh Plate Glass Co.*, 168 Fed. 73 . C. W. D. Penna.); *Schmertz Wire Glass Co.* v. *estern Glass Co.*, 178 Fed. 977 (C. C. N. D. Ill. E. D.). ere, however, the confirmation proceedings *do* pre-t a case or controversy and the constitutional courts have jurisdiction. It is clear that the Act of 1851 es not contemplate or provide for a decision by the ard of Land Commissioners in any case where, upon taking of the proper steps, an appeal would not lie the District Court. And certainly after an appeal

has been properly perfected, the decree of the Board of Land Commissioners cannot be pointed to as effective and conclusive where the decree of the District Court, to which jurisdiction over the case has been transferred, is not binding on innocent persons because of acts done by the parties thereto. The contention of the Government would mean that in a case where, at the time of decision by the District Court, there existed an actual controversy, but where, pending appeal, one side bought out the other, the parties to the proceeding could continue to rely on the District Court decision as binding on innocent persons. We submit that the principles of *res judicata* require the proceeding to be adversary at all times until final termination.

The contention is made by the Government that respondents did not raise a defense of fraudulent collusion in the District Court. (Govt. br. pp. 43-46). This argument again misconstrues respondents' position to be that the officers of the United States were guilty of intentional fraud. Respondents' position is, as we have pointed out, simply that because of the purchase by the United States of the Castro claim, the decree in the confirmation proceeding is not binding upon, and is null and void as to, respondents. That this was the position of respondents in the District Court, as well as in the Circuit Court of Appeals and here, is admitted by the Government on page 44 of its brief.

2. Respondents Were Not Represented in the Confirmation Proceeding.

This same result as that arrived at upon the principles pertaining to collusive and non-adversary proceedings is also reached upon a consideration of the

principles concerning representation of persons not actual parties to a suit.

Third parties were not permitted to intervene in confirmation proceedings—the United States and the claimants alone being entitled to be heard. *United States* v. *Fossat,* 61 U. S. (20 How.) 413; *White's Administrator* v. *United States,* 66 U. S. (1 Black) 501; *Rodrigues* v. *United States,* 68 U. S. (1 Wall.) 582. The intention was, of course, that the United States would represent the public interest and in particular would represent its own previous grantees. It is on this basis that this Court has held that previous grantees of the Government are not "third persons" within the meaning of those words in the Act of March 3, 1851. *Beard* v. *Federy,* 70 U. S. (3 Wall.) 478; *Moore* v. *Steinbach,* 127 U. S. 70; *Knight* v. *United States Land Association,* 142 U. S. 161.

It is familiar law that when a representative in any litigation or proceeding has or acquires an interest in the subject matter of the litigation antagonistic to the interests of those whom he represents, the representation in effect ceases and the persons supposedly represented are not bound, certainly as against the party supposedly representing them, by such judgment or decree as may be entered. *Northern Pacific Railway Company* v. *Boyd,* 228 U. S. 482; *McArthur* v. *Scott,* 113 U. S. 340. See also *Weberpals* v. *Jenny,* 300 Ill. 145, 133 N. E. 62; *Los Angeles County* v. *Winans,* 13 Cal. App. 234, 109 Pac. 640; *People ex rel. Oliver* v. *Knopf,* 198 Ill. 340, 64 N. E. 842; *Northern Pacific Railway Company* v. *Snohomish County,* 101 Wash. 686, 172 Pac. 878; *Sarator* v. *Newberry Land and Security Co.,*

104 S. C. 184, 88 S. E. 467. Cf. *Litchfield* v. *Goodman*, 123 U. S. 549.

Persons not parties to a proceeding are concluded under the rule of representation when and because persons who are parties have identical interests which self interest will require them to assert. If that identity of interest is lacking, the safeguards are withdrawn and under the above cases a person not a party will not be bound.

The situation at bar comes squarely within this rule since the United States acquired and actively asserted an interest hostile to respondents. In such circumstances the presumption of representation falls and respondents are not concluded. Certainly the United States cannot at the same time assert that it represented California in the proceeding and set up and claim under an interest which it had in that proceeding hostile to the interest of California.

3. The United States Held Legal Title in Trust for California and Can Not Use a Proceeding in Which it Appeared as Holder of that Title to Establish an Adverse Interest in Itself.

A third ground exists upon which the United States is precluded from now relying upon the confirmation proceedings as being conclusive on Respondents. This is that the United States held legal title to the property in trust for California and can not use a proceeding in which it appeared as holder of that title but in which it also had an adverse interest, to establish that adverse interest against California.

The Swamp Land Act of 1850 was a grant *in praesenti* to the states of the unsold swamp lands within

their borders, and the equitable right of California to the land in controversy was vested at the time of that Act. *Wright* v. *Roseberry,* 121 U. S. 488, 509; *Tubbs* v. *Wilhoit,* 138 U. S. 134; *Rogers Locomotive Works* v. *Emigrant Co.,* 164 U. S. 559, 570; *Michigan Land & Lumber Co.* v. *Rust,* 168 U. S. 589, 591; *Work* v. *Louisiana,* 269 U. S. 250.[5] The equitable rights which immediately passed under this Act amounted to an inchoate title, even though the particular lands involved had not yet been surveyed and ascertained to be swampy and overflowed. *Rogers Locomotive Works* v. *Emigrant Co., supra,* p. 570; *United States* v. *Minnesota,* 270 U. S. 181. Where inchoate rights of this sort to public land have been found to be vested under Acts of Congress, this Court has uniformly decided that the title to the land was held by the United States in trust for the possessor of the rights. See, for example, *Orchard* v. *Alexander,* 157 U. S. 372, 383; *Knapp* v. *Alexander Co.,* 237 U. S. 162; *United States* v. *Anderson,* 194 U. S. 394; *Payne* v. *New Mexico,* 255 U. S. 367, 371; *Cornelius* v. *Kessel,* 128 U. S. 456, 460-1; *Benson Mining Co.* v. *Alta Mining Co.,* 145 U. S. 428, 432. A similar decision has resulted even where the inchoate rights were received through a gift from the United States rather than a sale (*United States* v. *Anderson, supra*) and this rule is applicable to the inchoate rights ———).

[5] Contention is now made by the Government that Survey "34" was claimed under the Castro grant in 1850 so that the Swamp Act had no application to that property even though the Castro grant was in fact invalid or did not in fact cover the property. Neither factually nor legally is there any substance to this argument as we shall demonstrate in considering that particular point (*infra,* pp. 73-79).

received by the states under the Swamp Land Act (*Brown* v. *Hitchcock,* 173 U. S. 473, 476; *Michigan Land & Lumber Co.* v. *Rust, supra.*).

Under the rule of these cases the United States, at the time of the Land Commission proceedings, held the legal title to the land here in controversy in trust for the State of California. The United States, holding legal title in trust for the State, could not, in equity, advance its own interests to the prejudice of the rights of the State by purchasing an adverse interest in the property and establishing that interest by litigation against itself as representative of the equitable interest of California. One in the position of a trustee or agent is not permitted to acquire a dominant interest or otherwise make profit out of dealings with the property. *Michoud* v. *Girod,* 45 U. S. (4 How.) 503, 522; *Chicago etc. Railroad* v. *Des Moines etc. Railroad,* 254 U. S. 196, 220. This disability is not dependent upon proof of actual fraud but is an absolute disability arising out of the high degree of duty and loyalty required of trustees and agents by courts of equity. Bogert, Trust and Trustees, Vol. 3, secs. 485, 543.

It was upon this ground that the court below put its decision refusing to recognize the Confirmation decree as *res judicata.* The Government seeks to meet the argument by asserting that the United States was not an active trustee in the strict sense. (Govt. br. pp. 52-58.) However the disability relied upon by the court below is not confined to strict trustees. As Lord Loughborough stated in *Whichcote* v. *Lawrence,* 3 Ves. Jr. 740, 750:

* * * he who undertakes to act for another in any matter, shall not in the same matter act for himself.

This rule has broad application to all who act as gents or in any representative capacity whatsoever. *Michoud* v. *Girod, supra.* It is specifically applicable o both vendors and vendees and neither may buy up nd assert a title adverse to the other unless it be for he purpose of mutual protection. *Warvelle, Vendors,* d ed. sec. 186. Whether or not the United States was ere a trustee in the strict sense is entirely immaterial o the application of this doctrine.

In connection with this point the Government again rges (br. 58-60) that California and Respondents are stopped by the California cession act (Calif. Statutes, 854-55, C. 43 p. 48; App. *infra* pp. 105-107). As we ave pointed out above, that act carefully excludes the and in controversy. We submit that its true effect, vhen taken in connection with Attorney General Cush-ng's opinion (8 Ops. A. G. 443) is to establish an agree-nent between the United States and California that California had good title to Survey "34" and that the Castro grant had no relation thereto.

A state which has received equitable rights to land nder the Swamp Land Act may not be arbitrarily dis-ossessed thereof by the Government. *Michigan Land & Lumber Co.* v. *Rust, supra.* Those rights may be ter-minated only by due process of law, implying notice and earing. *Brown* v. *Hitchcock, supra; Orchard* v. *Alex-nder, supra.* Although the relationship which exists etween the United States and its Swamp Act grantees

might not be one of a strict trust in the technical sense, that relationship is certainly of a kind to come within the rule here contended for and to forbid the United States from terminating the rights of a state by buying up an adverse interest and asserting it in a proceeding against itself as a holder, for the benefit of the state, of the legal title.

B. The Confirmation Proceeding Has Not Been Made Conclusive by Laches.

In two places in the Government's brief (pp. 60-65; 72-74) it is argued that the confirmation proceding may be relied upon by the United States as conclusive on Respondents because Respondents have been guilty of laches. The basis of this argument is an assertion that respondents have stood silently by without making known their claim and permitted the United States to make large expenditures on the faith of the Confirmation Decree.

We cannot believe that in the face of the present record the Government can be serious in this contention. The United States did not commence to build on Survey "34" until 1915. (See stipulation to that effect in Mandamus record, p. 63 of Ex. J, original, and see full discussion of this whole matter in argument on adverse possession, *infra* pp. 81-90.) As a matter of fact the land was not filled in until after 1914 and the fill had not extended far even by 1917. (R. 806. See Deft's. Ex. 3, App. *infra* p. 120, which is the drawing prepared by the Navy Department in 1914 upon which bids were submitted for the filling of that part of "34" closest to the upland.) Prior to that time the ejectment suit

by respondents' predecessor had been brought and dismissed (*Sawyer* v. *Osterhaus, supra*) and during all of the time that the Government was building on this land the proceedings were pending which were commenced in 1912 by California before the Interior Department for a patent and in which, after the stimulus of three writs of mandamus, the patent was issued to California in 1928. (R. 33-35, 543-551; Pltffs Ex. J, pp. 35-44, 48-57, original.)

Certainly it cannot be said that Respondents stood by silently in a way amounting to a disclaimer of title while the United States spent large sums in improvement (*Kirk* v. *Hamilton,* 102 U. S. 68, 78-79, quoted in Government's br. pp. 72-73) or passively looked on while money was being spent without making known their claim (*Wendell* v. *Van Renselaer,* 1 Johns Ch. 344, 354, quoted in Government's brief p. 73). The United States saw fit in 1914 to take possession of the land, erect a fence, and commence to improve the property, in the face of the fact that respondents were and had been for many years actively asserting their ownership. When the proceedings which were started in 1912 finally resulted after 16 years in the issuance of a patent to respondents, the Government cannot claim laches on the basis of its improvements during that time.

The truth is that from 1873, when the officers of the Government for the first time, as it would seem, decided that the swamp lands north of the Island should be a part of the Navy Yard and attempted to take possession by building two shacks on Survey "569", to date the United States has at all times known of the title of Respondents and known that it was being actively as-

serted. Warning was given in 1873 to the Commandant of the Navy Yard to refrain from taking sand from the land. (R. 783.) Formal protests against the Freeman survey were filed with the Surveyor General and with the Commissioner of the General Land Office in 1879. (R. 583-593.) By 1905 proceedings were pending in court. (R. 535.) Throughout this entire period respondents have continuously asserted title to this property, to the Government's knowledge. It is impossible to find laches on these facts.

The point to which the Government's argument of laches is directed is not entirely clear. It is included in the brief as part of the argument on the conclusiveness of the confirmation decree. Yet no final decree was entered in that proceeding until just prior to the commencement of this suit[6] and it is obvious that the conclusiveness of that decree cannot depend on laches nor can it be said by the Government that they improved the property in reliance on any final decree in that proceeding. If there is any laches here it is on the part of the parties to the confirmation proceeding in letting the case go for 73 years without a final decision.

Argument is made by the Government that respondents should have resorted earlier to the series of mandamus suits by which they secured a patent. If it be intended by this to urge that the patent is void because

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[6] The Government argues (br. 35-39) that there existed a valid and subsisting decree in 1857. However, the *nunc pro tunc* decree in 1930, signed on motion of the Government, states that no decree had been entered and that the case was still pending and undecided. (R. 290.) The Government will certainly not be heard now to urge the contrary.

of laches in securing it, we submit that such a contention should have been made in the mandamus suit which ordered the patent issued. Moreover it would be a most surprising and novel rule if the Government could defeat a person's right to a patent on the ground of laches because of a delay in bringing mandamus to compel a Government officer to perform a ministerial duty.

In any event it is clear that there exists here no basis in fact for imputation of laches and the Government's contention in this regard is not well taken.

IV.

The Swamp Land Act Applied to the Land in Controversy.

Assertion that the lands in controversy were withdrawn from the operation of the Swamp Land Act because claimed in 1850 under a Mexican grant rests, we submit, upon a misconception of both the facts and the law.

It rests upon a misconception of the facts because in 1850 the land in controversy was not claimed under a Mexican grant. The grant to Castro was simply of "Mare Island". As we have shown (*supra* pp. 31-37) those words under Mexican law covered only the area above highest high tide and had no application to Survey "34". Nothing had occurred in 1850 to give basis to any larger interpretation of the boundaries of the grant, and there is no evidence in the record that anyone suggested before 1852 that any swamp lands were included. Were, then, the application of the Swamp Land Act to be tested, as the Government contends, by what was claimed under Mexican grants in 1850, the

conclusion would be that the land here was subject to the Act.

With the test proposed by the Government, however, we take definite issue and submit that it is entirely incorrect as a matter of law. The argument that lands claimed under fraudulent Mexican grants, or claimed under valid Mexican grants not in fact covering the lands, were not within the application of the Swamp Land Act is based on *Newhall* v. *Sanger,* 92 U. S. 761. The analysis of the holding in that case made by the Government to support this contention is, however, far different from the analysis of the holding of the same case made by *this Court* in the later decision of *Lockhart* v. *Johnson,* 181 U. S. 516. In *Newhall* v. *Sanger* land was claimed under the Pacific Railroad Acts of 1862 and 1864. At the time of the passage of those acts the land was within the boundaries of an alleged Mexican grant, and proceedings for the confirmation of this grant were then pending before this Court. This Court held in the *Newhall* case that by reason of the Act of March 3, 1851 (Ch. 41. 9 Stat. 631, *infra* pp. 97-104) the land claimed under the Mexican grant was withdrawn pending decision of the confirmation proceeding and that consequently it did not pass to the Railroad under the Pacific Railroad Acts. The Government interprets this holding as being to the effect that lands claimed under a Mexican grant were, even prior to the Act of March 3, 1851, reserved from disposal by the United States as public lands. Upon this construction of *Newhall* v. *Sanger*, and a like construction of the case of *United States* v. *McLaughlin,* 127 U. S. 428,

which follows it, the entire contention of the Government under this point is based.

This construction put by the Government on *Newhall* v. *Sanger* is, however, entirely contrary to the meaning and effect of that decision as enunciated by this Court in the later case of *Lockhart* v. *Johnson, supra.* In that case lands in New Mexico were claimed under a location made under the mining laws at a time when a proceeding before the Court of Private Land Claims set up in 1891 was pending for the confirmation of a Mexican grant to the same property. The confirmation proceeding was terminated by a holding that the property was outside the limits of the grant, but this termination occurred subsequent to the location of the lands under the mining laws. The contention in that case was that the mining location was inoperative because the lands were withdrawn from entry until final determination of the Mexican claim. This Court held to the contrary on the ground that there was no statute in existence withdrawing the land, and on the further ground that the Treaty of Guadalupe Hidalgo in no way operated as a withdrawal of lands claimed but not included under a valid Mexican grant. The opinion stated (pp. 522, 523):

> The mere fact that lands were claimed under a Mexican grant, when such grant did not in truth cover them, would not by virtue of any language used in the treaty operate to reserve such lands from entry and sale. * * * Whatever reservation there is must be looked for in the statutes of the United States, * * *

This Court then considered the case of *Newhall* v. *Sanger*, saying (p. 525):

> Nor does the case of *Newhall* v. *Sanger*, 92 U. S. 761, 23 L. ed. 769, apply. In that case it was held that lands within the boundaries of an alleged Mexican or Spanish grant which was *sub judice* at the time the Secretary of the Interior ordered a withdrawal of lands along the route of the railroad, were not embraced in the congressional grant to the company. The decision went upon the ground that the legislation of Congress had been so shaped that no title could be initiated under the laws of the United States to land covered by a Spanish or Mexican claim until it was barred by lapse of time or rejected. *The act of March 3, 1851 (9 Stat. 631, 633, sec. 13), which provides for the presentation of claims under Mexican grants in California to the commission established by the act, was referred to by the court, and it was held that by reason of its provision the lands were not public lands under the laws of the United States* until the claims thereto had been either barred by lapse of time or rejected. *The 6th section of the act of 1853, March 3 (10 Stat. 244, 246), was also referred to as expressly excepting all lands claimed under any foreign grant or title.* (Emphasis supplied.)

From this statement it is apparent that lands claimed to be but not actually covered by a valid Mexican grant are not withdrawn unless there was in effect, at the particular time involved, a statute providing for such withdrawal. The holding of *Lockhart* v. *Johnson* in this regard and the interpretation there made of the decision of *Newhall* v. *Sanger* was followed and em-

phasized in *Lane* v. *Watts,* 235 U. S. 17. This Court specifically said in that case (p. 22): "The mere fact of a claimed Mexican grant did not reserve the lands covered by it".

The attempt of the Government to justify its interpretation of *Newhall* v. *Sanger, supra,* by distinguishing *Lockhart* v. *Johnson, supra,* and *Lane* v. *Watts, supra,* on the ground that they related to lands in New Mexico is entirely without merit. The opinions themselves indicate that this Court was enunciating only one rule of law consistently applied in all three cases, and was not enunciating two different rules of law, one for New Mexico and one for California. The statements of this Court in *Lockhart* v. *Johnson* concerning *Newhall* v. *Sanger* were an interpretation of the effect of that decision and it may not now be cited, as the Government seeks to do, as authority for a rule of law which this Court states definitely it did not adopt in the *Newhall* case.

The Government also relies on the decision of the Supreme Court of California in *Shanklin* v. *McNamara,* 87 Calif. 371. That case, however, is plainly in conflict with the later decision of this Court in *Carr* v. *Quigley,* 149 U. S. 652, and therefore does not represent the law. If the decision in *Shanklin* v. *McNamara* were the law, the Swamp Land Act would have applied to no land at all within the State of California, for it appears that the entire State was within the out boundaries of a claimed Mexican grant. *Carr* v. *Quigley, supra,* at p. 660. And insofar as *Shankin* v. *McNamara* is relied upon here to establish that the mere fact of a claimed Mexican grant withdrew the lands covered

by it, it conflicts with the law as established by this Court in *Lockhart* v. *Johnson* and *Lane* v. *Watts*.

To support its assertion that the Swamp Land Act had no application to the land in controversy because claimed under a Mexican grant, the Government must show that an Act of Congress was in force in 1850 withdrawing lands so claimed. But no such statute was then in existence. Of course, title under a valid Mexican grant dates back to the time of the grant by the Mexican authorities and would give a title paramount to the rights passing under the Swamp Act. *City and County of San Francisco* v. *Leroy*, 138 U. S. 656; *United States* v. *Coronado Beach Co.*, 255 U. S. 472. But an invalid grant gives no such title and in no way operated to prevent the lands from passing under the Swamp Act.

Any different conclusion would not only be contrary to the law as settled by this Court, but also would be inadmissable as a practical matter. The Swamp Land Act was a grant *in praesenti* in 1850 and its scope is determined by the conditions then existing. At that time it was utterly unknown what lands were covered or claimed under Mexican grants. If only the lands actually covered by a valid Mexican grant, are excepted from the operation of the Swamp Land Act, determination of the scope of the Swamp Land Act in California may be arrived at with certainly from the decrees of the Board of Land Commissioners and the Courts. If, however, the application of the Swamp Land Act is to depend upon whether or not there existed in 1850 a claim to the land under a Mexican grant, titles to California swamp lands will always be subject to the possibility that some one will assert that in 1850 the property was

claimed under a grant, even though the claim was afterwards abandoned without ever being presented to the Board.

We submit that in 1850 the State of California received equitable title to the land in controversy under the Swamp Land Act and that this title may be defeated only by proof that the land had previously passed into private ownership under a valid Mexican grant.

V.

The United States Has Acquired No Title by Adverse Possession.

Strong reliance is now placed by the United States on the doctrine of adverse possession, although it is admitted (Govt.'s br. p. 22) that the point was not even argued by Government Counsel before the Circuit Court of Appeals. We submit that not only is there no justification for the argument on the facts, but also the claim of adverse possession will not lie legally in the situation here presented.

On the question of adverse possession, we assume that evidence will mean more than conclusions and that the constant repetition in the Government's brief of the statement that the United States has been in possession of the property since 1853 will not establish the assertion in the absence of proof thereof in the record. The constant use of this date in the Government's brief is interesting and important because it illustrates how an incorrect allegation made in the bill of complaint filed herein by the United States (R. 10) has crept into the findings of the District Judge (R. 171) and has now been perpetuated in a brief filed before

this Court, all because of lack of consideration of the facts as shown in the record.

The actual date upon which Commander Farragut took possession of the *highlands* of Mare Island was September 16, 1854, as is proven by his Log Book introduced into evidence by the Government. (R. 769.) Yet the District Court below finds as a fact that "ever since September 16, 1853, the United States has occupied the lands". (R. 171.) The reason for this will be clear if this Court will compare the Findings of Fact word for word with the Government's bill of complaint. It will be seen that the first half of the Findings are a verbatim repetition of the Bill. The latter part of the Findings are a repetition of the contentions made by respondents before the District Court, prefaced in each case by a negative. Obviously no painstaking or even reasonably thorough examination of the evidence in the record was the genesis of the Findings. The District Judge very apparently made up his mind that the Government was right and signed the Findings presented to him without comparison with the evidence. As a consequence, all of the allegations of the bill of complaint, the incorrect as well as the correct, are transmuted into determined facts for the edification of the appellate tribunals.

We realize that it is a harsh thing to suggest that a District Judge has adopted findings of fact without adequate consideration of the evidence. On what is disclosed here, however, we feel that this suggestion is compellingly called for, particularly when it is borne in mind that it was this same Judge who signed the *nunc pro tunc* decree in the Confirmation proceeding, a de-

cree which on the face of it showed that the proceeding was non-adversary and which contained a paragraph unnecessary to the proper entry of such a decree and obviously inserted in an attempt to foreclose the rights of persons not parties to that proceeding.

Certainly in an equity case with this background, this Court will not permit its decision to rest on the findings of the District Court, but will wish to examine the evidence properly introduced to determine for itself the true factual situation presented. Even the cases cited by the Government in support of its assertion that the findings should have been accepted by the Circuit Court of Appeals and should be accepted by this Court indicate the importance placed by this Court upon whether or not there was a careful and painstaking consideration of the evidence by the District Court. See *United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451, 455.

Consideration of the evidence in the record clearly establishes, we submit, that the United States did not take possession of Survey "34" until 1914 when they fenced it and began to fill it in. Commander Farragut, as we have pointed out, first took possession of the highlands of Mare Island on September 16, 1854. Although the United States had purchased Bissell and Aspinwall's claim more than a year and a half before (R. 302-308) it had been necessary under the appropriation act to secure aproval by the Attorney General of the Government's title before construction of the Navy Yard could commence. After consideration of the matter, Attorney General Cushing gave his opinion to the effect that California had good title to the tide

and overflowed lands of Mare Island by reason of its ownership of tide lands and by reason of the Swamp Land Act, and required as a prerequisite to the spending of money on the project that a relinquishment be secured from California of her rights to the swamp and overflowed lands on the Island. (8 Ops. A. G. 443.)

Upon receipt of this opinion the Secretary of the Navy wrote to the Governor of California and as a result thereof California passed the Act of May 11, 1854, (Calif. Statutes 1854-55, pp. 48-49, App. *infra* pp. 105-107) transferring to the United States the title and interest of the State in such portions of Mare Island as were overflowed, beach or swamp lands on the Eastern shore of the Island "from the Southern point thereof to a parallel intersecting the Northern point of the highlands."

The northern limit so definitely specified in the Act without any doubt excluded from the transfer the lands now in question and indicated clearly to the United States that California intended to retain its title to these lands, as recognized by Cushing. It is to be presumed that this Act was accepted by the Attorney General as being sufficient, for shortly thereafter Commander Farragut took possession.

Consequently the first point we wish to make is that the circumstances leading up to the original taking of possession of the Island were such as to draw a clear line of demarcation between the Island itself and the swamp lands to the north which are now in controversy. Commander Farragut went upon the Island under what amounts to an understanding between the

United States and the State that the State had and was retaining title to the land north of the parallel intersecting the northern point of the highlands.

That this was the understanding at the time is, we believe, clearly indicated by other circumstances. The very deed under which the United States took the property conveys Mare Island "as recently surveyed by the board of officers of the United States". The survey so referred to included only the highlands. (R. 842-843.) In view of this fact no reliance could have been placed by the Government on the additional words in the deed "including all the tule or low land and marsh belonging to the same" because it evidently referred to something other than and in addition to Mare Island, and the title of the Government's grantors as received by mesne conveyances from Castro was, to the Government's knowledge, limited to the Island. See *In re Wasson*, 54 Cal. App. 269, 201 P. 793.

Moreover neither Commander Farragut nor any of his successors for almost 20 years made any attempt to assert possession over these swamp lands. Farragut, it is true, hauled some sand up from the beach (R. 772-773) but just where that beach was located is not shown. Also Farragut on June 4, 1855 placed a target on the tule lands for the USS Massachusetts to try out its new guns on. (R. 774.) This target was only about a quarter of a mile north of the highlands (R. 592) yet Farragut speaks of the target as being "acros the Tuly on the Northern end of the Island". (R. 774.) Obviously Farragut had no understanding that the Island stretched 7½ miles north of the highlands. Furthermore the acts of taking sand from the beach and set-

ting up a target to shoot at are not such acts as indicate an intention to assert title and possession of property, particularly when the lands were as wild and unsettled as were these swamp lands in 1855. See *In re Wasson, supra; Litchfield* v. *Ferguson,* 141 Mass. 97, 6 N. E. 721; *Parker* v. *Wallis,* 60 Md. 15; *Price* v. *Brown,* 101 N. Y. 669, 5 N. E. 434.

That Farragut had no intention of asserting possession of Survey "34" is indicated by the fact that during his first few years on the Island, the swamp land was surveyed by private parties three times without protest from him. (R. 758-759, 591-592½, 383-388.)

California, apparently acting on the basis of the understanding above referred to, sold the land comprised in Survey "34", issuing its patent on March 18, 1857. At that time there was nothing to indicate any intention on the part of the United States to claim this land nor was anything done by the United States to suggest any such intention for 16 years or until 1873.

In 1863 the Coast and Geodetic Survey made a most accurate and detailed survey of the Island and the swamp lands. (Pltffs. Ex. L 25, relevant parts reproduced app. *infra* p. 117.) This map sets out clearly the many buildings on the highland but shows Surveys "34" and "569" as still entirely in their natural state without occupation or improvement by structures of any kind.

Ten years later in 1873, however, the Navy Department decided to formulate plans for the enlargement of the Mare Island Base and appointed a Board for that purpose. (R. 483-485.) It is in connection with these plans and at this time that the Navy Department

first decided that it desired the swamp lands north of the Island. And being far from the events of 1854, the officers of the Government concluded that they already had good title to this property. Apparently learning of the attitude of the Government, the then holder of the swamp land title to "34" immediately made it known to the officers that he claimed title. (R. 488.) Whereupon on September 29, 1873 the Commandant of the Navy Yard sent out a force of men to construct two cabins, one about a mile north of the highlands and the other at the northern end of survey "569", 7½ miles from the highlands. (R. 776-778.) Also it would seem that some iron stakes were put up at the northern end of Survey "569". (R. 719.) These stakes, of course, were many miles north of Survey "34".

It appears that the shacks were soon abandoned, however, and no further buildings were constructed on the swamp. *San Francisco Savings Union* v. *Irwin, supra.* In 1876 the Coast Survey made a chart of the Swamp Lands north of Survey "34". (Pltffs. Ex. L 26, original.) This chart shows no occupation of any kind of Survey "34". In 1877 Freeman made his survey of the area. (R. 711-720.) The only occupation or improvement noticed by him was a fisherman's cabin. (R. 715.) Although he found the iron stakes standing and refers to them, he makes no mention whatsoever of the continued existence of the shacks erected by the Government in 1873. (R. 719.)

In 1886 the Coast and Geodetic Survey made a resurvey of San Pablo Bay. Pltffs. Ex. L 27, relevant parts reproduced, App. *infra.* p. 118) This shows all of the Naval Yard development to be still confined to

the highlands, Survey "34" still being in its natural swampy state without occupation or improvement of any kind. Targets are shown out in the bay but no targets are indicated as being located on Survey "34".

In 1886, Justice Field in *San Francisco Savings Union* v. *Irwin, supra,* considered all of the circumstances hereinabove related and held that they did not show any adverse possession. After that decision, and particularly after affirmance by this Court in 1890, the Government appears to have given up all thought of occupying or asserting title to the swamp lands north of the Island. The holder of the Swamp Land title to Survey "569", which was directly involved in the Irwin case, took possession and built extensive levees including not only Survey "569" but also most of Survey "34". (R. 597, 599, 778, 789, 850 and map opposite R. 614.) The land comprised within these levees was by that means reclaimed and thereafter cultivated. (R. 599, 778.) The privately built levees and the extent of the land included within them are clearly shown on a map prepared by the United States Geological Survey in 1902. (Pltffs. Ex. L 31, the relevant portions of which are reproduced in the app. *infr.* p. 119.) The land enclosed in the levees is there shown as a separate island entitled "Island No. 1."

Thus we see that the first actual possession, reclamation and use of the land was the work of private parties. These private parties thereafter remained in possession of the land until 1914 when, following the decision in *Sawyer* v. *Osterhaus, supra,* to the effect that respondents' predecessors had no right to bring ejectment, the Government took possession of the property

and erected a fence at the northern boundary of Survey "34". (R. 623.) It is true that during this period a road and a telephone line were built along the top of one of the levees and into the Navy Yard, but in view of the actual occupation of the land by private parties it is clear that this use was permissive rather than adverse. (See Deft's Ex. 3, a photostatic copy of which is reproduced in the appendix *infra*, p. 120, and Pltffs. Ex. L 29, original.) Also it appears that at some time during this period, dirt excavated on the Island was dumped over the bank onto the swamp land, covering a small area to the depth of perhaps 6 inches. (R. 765.) To base adverse possession on this would be, of course, preposterous.

After taking possession in 1914, the Government proceeded to build extensively on the property. Before doing this, however, it was necessary to reclaim the land not included within the levees built by the private parties. This was done by the building of an additional levee and the letting of contracts for filling. (See Deft's. Ex. 3, reproduced in the appendix *infra*, p. 120.) The extent of the construction on this property, which has all occurred after 1914, is indicated by Defendant's Exhibit 6, a map of the Navy Yard as of June 30, 1926, the relevant parts of which are reproduced in the appendix, *infra*, p. 121.

This is the history of the lands in controversy as told by the evidence herein and we utterly fail to see any ground upon which the Government may urge adverse possession. The Government's reliance seems to be put on Plaintiff's Exhibit G. G. (original) and par-

ticularly upon the statement contained therein that in 1858 the steam engineering building, costing $370,000, was erected partly on the lands in controversy. Plaintiff's Exhibit G. G. is a list prepared in 1921, under the direction of Captain Carl Carlson of the Civil Engineering Corps, for use by the Government in the proceedings brought by California for a patent to Survey "34". (R. 785-786.) Captain Carlson had been stationed at Mare Island twice, once in 1916-1917 and again from 1925 to 1928. (R. 762.) He states that the list is prepared from the records but he does not tell us what records nor where it was prepared. (R. 785.) It is evident that it was not prepared at Mare Island for he was not at the Island in 1921. He endorses it only as "substantially correct to the best of my knowledge". (R. 785.) We submit that adverse possession is not to be based upon the statements of such a document unless those statements are definitely substantiated by independent evidence.

Not only does the evidence not substantiate Captain Carlson's list, but also it goes further and shows that Captain Carlson has included improvements not in any way located on Survey "34". The Steam Engineering building, which the Government particularly specifies (br. 23) was built entirely south of the southerly boundary of respondents' property as is conclusively shown by the record. (R. 57; Pltffs. Exs. L 25, L 27 and Defts. Ex. 3, reproduced *infra* pp. 117, 118, 120; Pltffs. Exs. L 18, L 23, L 24, L 26, JJ, KK and Defts. Ex. 28, original.) Even the map which accompanies the list prepared by Carlson shows that the engineering build-

ing was not on Survey "34". (Pltffs. Ex. G. G. original.) The fact is that the engineering building was fifty feet distant from the southern boundary of Survey "34". (R. 783.)

Carlson also includes a road along the beach (1855), a water main (1875), and the drilling of a well (1883). No evidence is found in the record substantiating any of these items. We have already referred to the artillery target in 1855 and the shacks built in 1873. Carlson also lists targets in 1886 although the Geodetic Survey map shows that they were not on Survey "34" at all but out in the Bay. (Pltffs. Ex. L 27, reproduced appendix, *infra* p. 118.) Although Carlson states "Spoil area, 1898 and later" it appears that even the portion of survey "34" not in the possession of private parties was not enclosed so as to become a spoil area until 1914 (See Defts. Ex. 3, reproduced appendix, *infra* p. 120) as is admitted by Carlson himself later in the list when he specifies that the "East levee" was not built until 1914. No actual construction on, or improvement or occupation of, survey "34" prior to 1914 is indicated by any substantive evidence introduced in this case, and the maps of the area demonstrate that Survey "34" was in its original wild state, except as improved by private parties, until 1914.

On page 24 of the Government's brief it is stated that the record does not show that any attempt was made to reclaim the land except by the Government. Of course the fact is as shown above that the land was diked and reclaimed by the owners of Survey "569".

In the light of all of the evidence it is apparent that the Government took no possession whatever of "34" until 1914, and certainly not that actual, visible, exclusive and continuous possession required to create a bar under the Statute of Limitations. *Ward* v. *Cochran,* 150 U. S. 597. The California Statutes are specific as to what acts are necessary to constitute adverse possession. Even if it be thought that the Government held a written instrument covering Survey "34" (but see remarks on this point in discussion of constructive possession, *infra* pp. 90-92) the requirements of California law are not met by the evidence disclosed here. Calif. Code of Civil Procedure, secs. 322, 323, App. *infra,* pp. 107-108. And certainly if, as we contend the deed under which the United States took Mare Island did not cover Survey "34" the more stringent provisions applicable in that case must defeat the claim of adverse possession here. *Ibid.* secs. 324, 325, App. *infra,* pp. 108-109.

After 1914 the Government was in possession, but the proceedings commenced in 1912 for a patent were then pending and were not terminated until issuance of the patent in 1928. The Government, of course, could not base adverse possession on occupation during that period, particularly when the long delay was occasioned by the refusal of officers of the Government to perform ministerial duties making it nec ssary for respondents to bring three mandamus suits.

The implication on p. 27 of the Government's brief that even though no actual occupation of Survey "34" was proved, still the Government might secure title by adverse possession because they occupied the Island it-

self under a written conveyance referring to swamp lands, is not sustainable. The rule to the effect that occupation of part of a tract of land described by a deed will be considered as occupation of the whole if claim is made to the whole and no one else is in possession, applies only where the boundaries of the property are set out with such definiteness in the deed that one reading it may be apprised of the exact area covered. If by reason of vagueness or uncertainty, the description given is such that positive identification of the land not occupied may not be reasonably reached therefrom, the rule is without effect. *Clark* v. *Courtney*, 5 Pet. 318; *In re Wasson, supra; Black* v. *Tennessee Coal Co.*, 93 Ala. 109, 9 So. 537; *Jackson* v. *Woodruff*, 1 Cow. (N. Y.) 276. In the case of *In re Wasson, supra,* the Court of Appeals of California held that there was no constructive possession of a sand bar where only the upland was occupied and where the deed although referring to and including a sand bar, did not specifically describe it by metes and bounds.

This is certainly the situation here. The deed under which the Government claims is of Mare Island "as recently surveyed by the board of officers of the United States sent to California for the selection of a site for the Navy Yard there". (R. 303.) The survey which is thus made the controlling part of the description (see Civil Code of California, sec. 2077 C), showed the Island as consisting only of the highlands and did not include any of the swamp lands lying to the north. (R. 842-843.) Although the deed goes on to say "including all the Tule or low land and Marsh belonging to the

same or which has ever been reputed or claimed to belong to the same", (R. 303) it is apparent that this contemplated something in addition to that which was comprised within Mare Island itself. The Government's grantors had no rights which they could convey other than to the Island itself because the Castro grant and the mesne conveyances to them were limited to the Island. This fact was, of course, known to the Government at the time, since the Confirmation proceeding was then pending. Certainly, then, it cannot be said that the Government was holding possession of the uplands under a chain of title definitely and positively including the particular swamp lands comprised in Survey "34". That in determining constructive possession the entire chain of title relied upon will be considered, see *In re Wasson, supra.*

Moreover, completely ignoring the Sloat Board survey, it is obviously impossible to determine from the description in the deed what swamp lands are covered thereby since no definite boundaries are given. And when it is considered that Attorney General Cushing held that the deed did not give title to the United States to overflowed lands, we submit that it cannot properly be said that the possession by the Government of the uplands was under a deed so clear as to give adverse rights to any particular tract of swamp land without actual possession thereof. Furthermore the Government is prevented from relying upon the doctrine of constructive possession by the fact that the land was actually occupied by private parties from 1886 on, without protest from the United States.

No adverse possession, then, is maintainable on the facts in this case. Even if it were otherwise, however, we submit that as a matter of law adverse possession would not lie. It is settled by this Court that the running of a state statute of limitations with regard to adverse possession will not commence against a grantee of the United States until patent has issued. *Redfield* v. *Parks,* 132 U. S. 239; *Henshaw* v. *Bissell,* 85 U. S. 255, *Northern Pacific Railway* v. *Slaght,* 205 U. S. 122. The construction put upon the California statute by the Supreme Court of the State is the same. *Gardiner* v. *Miller,* 47 Cal. 570; *O'Conner* v. *Fogle,* 63 Cal. 9; *Gage* v. *Downey,* 79 Cal. 140, 21 p. 527, 855. This is for two reasons, first, that until the patent is issued, the grantee has no right to bring an action at law in the courts of the United States, and second, that statutes of Limitation do not run against the Government. It is no answer to say, as the Government does (br. 27-28), that respondents at all times had the equitable remedy of mandamus, which after the securing of three successive writs, finally brought about the issuance of a patent. Adverse possession is based upon a limitation put by statute on the bringing of possessory actions, and the running of the statute can commence only when the cause of action accrues. The right to bring such a possessory action did not accrue to respondents here until 1928 and, as settled by the above cases, the Statute of Limitations could commence to run only as of that date.

Also another legal principle prevents adverse possession here. The question of the right of the Government to secure rights against its citizens by adverse posession has arisen very infrequently. The leading case

recognizing such a right is *Stanley* v. *Schwalby*, 147 U. S. 508. The greatest objection to the securing of title by the United States through adverse possession considered by the court there was that the United States as a sovereign could not be sued. This Court answered that objection, however, by stating that in the case of the Government, protest against the occupancy and application for redress in the proper quarter would be quite as effectual in destroying the presumption of the right to possession or of the abandonment of a claim as would be a suit in the case of a private intruder. Under this holding no adverse possession in the Government could be supported here even if the respondents had at all times possessed a patent to the lands. Protest was made by respondents' predecessors every time the Government took any step looking to the assertion of title over this property, and the Government was at all times cognizant of the fact that respondents' rights had not been abandoned but on the contrary were being actively asserted.

We conclude that the United States has not established any title by adverse possession.

CONCLUSION.

It has taken more than a quarter of a century of constant litigation for respondents to get their rights before this Court for final determination. At the time this litigation was started, the land in controversy was unimproved, part of it being enclosed in dikes and farmed by private parties and the rest swamp lands in their original state covered with tule and salt grass. While the litigation has been pending, the United

States has taken the property, added it to the Navy Yard and has, as it asserts, spent two million dollars in developing the lands. Now in the conclusion to its brief the United States suggests that these expenditures made *pendente lite* should bear an influence on the decision to be reached by this Court. We believe that ordinary considerations of justice and equity entitle respondents to a decision on the facts as they existed when the litigation was commenced and we are confident that this Court will consider the case on that basis.

It is submitted that the decree of the Court below was right and should be affirmed.

Respectfully submitted,

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APPENDIX.

Act of September 28, 1850, c. 84, 9 Stat. 519:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State.

SEC. 2. *And be it further enacted,* That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: *Provided, however,* That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

SEC. 3. *And be it further enacted,* That in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is "wet and unfit for cultivation," shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

SEC. 4. *And be it further enacted,* That the provisions of this act be extended to, and their bene-

fits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known as designated as aforesaid, may be situated.

Approved, September 28, 1850.

Act of March 3, 1851, c. 41, 9 Stat. 631:

Chap. XLI. An Act to ascertain and settle the private Land Claims in the State of California.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of ascertaining and settling private land claims in the State of California, a commission shall be, and is hereby, constituted, which shall consist of three commissioners, to be appointed by the President of the United States, by and with the advice and consent of the Senate, which commission shall continue for three years from the date of this act, unless sooner discontinued by the President of the United States.

SEC. 2. *And be it further enacted,* That a secretary, skilled in the Spanish and English languages, shall be appointed by the said commissioners, whose duty it shall be to act as interpreter, and to keep a record of the proceedings of the board in a bound book, to be filed in the office of the Secretary of the Interior on the termination of the commission.

SEC. 3. *And be it further enacted,* That such clerks, not to exceed five in number, as may be necessary, shall be appointed by the said commissioners.

SEC. 4. *And be it further enacted,* That it shall be lawful for the President of the United States to appoint an agent learned in the law, and skilled in the Spanish and English languages, whose spe-

cial duty it shall be to superintend the interests of the United States in the premises, to continue him in such agency as long as the public interest may, in the judgment of the President, require his continuance, and to allow him such compensation as the President shall deem reasonable. It shall be the duty of the said agent to attend the meetings of the board, to collect testimony in behalf of the United States, and to attend on all occasions when the claimant, in any case before the board, shall take depositions; and no deposition taken by or in behalf of any such claimant shall be read in evidence in any case, whether before the commissioners, or before the District or Supreme Court of the United States, unless notice of the time and place of taking the same shall have been given in writing to said agent, or to the district attorney of the proper district, so long before the time of taking the deposition as to enable him to be present at the time and place of taking the same, and like notice shall be given of the time and place of taking any deposition on the part of the United States.

SEC. 5. *And be it further enacted,* That the said commissioners shall hold their sessions at such times and places as the President of the United States shall direct, of which they shall give due and public notice; and the marshal of the district in which the board is sitting shall appoint a deputy, whose duty it shall be to attend upon the said board, and who shall receive the same compensation as is allowed to the marshal for his attendance upon the District Court.

SEC. 6. *And be it further enacted,* That the said commissioners, when sitting as a board, and each commissioner at his chambers, shall be, and are, and is hereby, authorized to administer oaths, and

to examine witnesses in any case pending before the commissioners, that all such testimony shall be taken in writing, and shall be recorded and preserved in bound books to be provided for that purpose.

SEC. 7. *And be it further enacted,* That the secretary of the board shall be, and he is hereby, authorized and required, on the application of the law agent or district attorney of the United States, or of any claimant or his counsel, to issue writs of subpoena commanding the attendance of a witness or witnesses before the said board or any commissioner.

SEC. 8. *And be it further enacted,* That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered.

SEC. 9. *And be it further enacted,* That in all cases of the rejection or confirmation of any claim by the board of commissioners, it shall and may be lawful for the claimant or the district attorney, in behalf of the United States, to present a petition to the District Court of the district in which

the land claimed is situated, praying the said court to review the decision of the said commissioners, and to decide on the validity of such claim; and such petition, if presented by the claimant, shall set forth fully the nature of the claim and the names of the original and present claimants, and shall contain a deraignment of the claimant's title, together with a transcript of the report of the board of commissioners, and of the documentary evidence and testimony of the witnesses on which it was founded; and such petition, if presented by the district attorney in behalf of the United States, shall be accompanied by a transcript of the report of the board of commissioners, and of the papers and evidence on which it was founded, and shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, a copy of which petition, if the same shall be presented by a claimant, shall be served on the district attorney of the United States, and, if presented in behalf of the United States, shall be served on the claimant or his attorney; and the party upon whom such service shall be made shall be bound to answer the same within a time to be prescribed by the judge of the District Court; and the answer of the claimant to such petition shall set forth fully the nature of the claim, and the names of the original and present claimants, and shall contain a deraignment of the claimant's title; and the answer of the district attorney in behalf of the United States shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, copies of which answers shall be served upon the adverse party thirty days before the meeting of the court, and thereupon, at the first term of the court thereafter, the said case shall stand for trial, unless, on cause shown, the same shall be continued by the court.

SEC. 10. *And be it further enacted,* That the District Court shall proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken by order of the said court, and shall, on application of the party against whom judgment is rendered, grant an appeal to the Supreme Court of the United States, on such security for costs in the District and Supreme Court, in case the judgment of the District Court shall be affirmed, as the said court shall prescribe; and if the court shall be satisfied that the party desiring to appeal is unable to give such security, the appeal may be allowed without security.

SEC. 11. *And be it further enacted,* That the commissioners herein provided for, and the District and Supreme Courts, in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.

SEC. 12. *And be it further enacted,* That to entitle either party to a review of the proceedings and decision of the commissioners hereinbefore provided for, notice of the intention of such party to file a petition to the District Court shall be entered on the journal or record of proceedings of the commissioners within sixty days after their decision on the claim has been made and notified to the parties, and such petition shall be filed in the District Court within six months after such decision has been rendered.

SEC. 13. *And be it further enacted,* That all lands the claims to which have been finally re-

jected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States; and for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor-general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of the said claims the said surveyor-general shall have the same power and authority as are conferred on the register of the land office and receiver of the public moneys of Louisiana, by the sixth section of the act "to create the office of surveyor of the public lands for the State of Louisiana," approved third March, one thousand eight hundred and thirty-one: *Provided always,* That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same, a copy of which petition shall be served upon the adverse party thirty days before the time appointed for hearing the same. *And provided, further,* That it shall and may be lawful for the district judge of the United States,

upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed, from suing out a patent for the same, until the title thereto shall have been finally decided, a copy of which order shall be transmitted to the commissioner of the general land office, and thereupon no patent shall issue until such decision shall be made, or until sufficient time shall, in the opinion of the said judge, have been allowed for obtaining the same; and thereafter the said injunction shall be dissolved.

SEC. 14. *And be it further enacted,* That the provisions of this act shall not extend to any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities thereof, nor to any city, or town, or village lot, which city, town or village existed on the seventh day of July, eighteen hundred and forty-six; but the claim for the same shall be presented by the corporate authorities of the said town, or where the land on which the said city, town, or village was originally granted to an individual, the claim shall be presented by or in the name of such individual, and the fact of the existence of the said city, town, or village on the said seventh July, eighteen hundred and forty-six, being duly proved, shall be prima facie evidence of a grant to such corporation, or to the individual under whom the said lot-holders claim; and where any city, town, or village shall be in existence at the time of passing this act, the claim for the land embraced within the limits of the same may be made by the corporate authority of the said city, town or village.

SEC. 15. *And be it further enacted,* That the final decree rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

SEC. 16. *And be it further enacted,* That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians.

SEC. 17. *And be it further enacted,* That each commissioner appointed under this act shall be allowed and paid at the rate of six thousand dollars per annum; that the secretary of the commissioners shall be allowed and paid at the rate of four thousand dollars per annum; and the clerks herein provided for shall be allowed and paid at the rate of one thousand five hundred dollars per annum; the aforesaid salaries to commence from the day of the notification by the commissioners of the first meeting of the board.

SEC. 18. *And be it further enacted,* That the secretary of the board shall receive no fee except for furnishing certified copies of any paper or record, and for issuing writs of subpoena. For furnishing certified copies of any paper or record, he shall receive twenty cents for every hundred words, and for issuing writs of subpoena, fifty cents for each witness; which fees shall be equally divided between the said secretary and the assistant clerk.

Approved, March 3, 1851.

California Statutes, 1854-1855, pp. 48-49, Chapter XLIII (Passed May 11, 1854):

AN ACT declaring the Consent of the Legislature of the State of California to the Purchase by the United States of Signor, or Mare Island; to relinquish the Title and Interest of the State in overflowed portions of said Island, and to vest the Jurisdiction over the same in the United States, for the purposes therein specified. [Passed May 11, 1854.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. The consent of the State of California is hereby given to the purchase by the United States of a certain tract or parcel of land situated in the county of Solano, known as Signor or Mare Island, for the purpose of erecting and maintaining thereon such arsenals, magazines, docks, dock-yards, and other military and naval structures as may be required for the use of the Government of the United States.

SECTION 2. The title and interest of the State of California to, and in such portions of the Island described in the preceding section as are overflowed beach, or swamp lands, on the eastern shore of the said Island, from the southern point thereof to a parallel intersecting the northern point of the highlands, and extending into the waters of the bay or straits, washing the eastern shore of said highlands of the Island to ship channel, is hereby relinquished and granted to the United States for the purposes specified in the preceding section; and the jurisdiction of such part of said Island, and the overflowed portions of the eastern shore thereof as are south of a parallel intersecting the

northern point of the highlands, is hereby ceded by the State of California to the United States for the purposes aforesaid: *Provided,* That the consent to the purchase, and the grant and relinquishment of title, by this State to the United States, in this Act contained, shall not be construed in aid or support, directly or impliedly, of any conveyance or bond for title to the United States of the same lands heretofore made, or which may hereafter be made, by any person or persons, company or corporations, or as a recognition on the part of the State of California of any claim, title or grant heretofore asserted or set up, or which may hereafter be asserted or set up by any person or persons, company or corporation.

SECTION 3. The jurisdiction ceded to the United States in the last preceding section is upon the express condition that the State of California shall retain a concurrent jurisdiction with the United States in and over said tract of land, so far as that civil process in all cases, and such criminal process as may issue under the authority of the State of California, against any person or persons charged with crime committed within or without said tracts of land, may be executed therein in the same way and manner as if this jurisdiction had not been ceded, except so far as such process may affect any of the real or personal property of the United States within the said tract of land; and all the lands and tenements within the limits aforesaid shall be, and continue forever hereafter, exonerated and discharged from all taxes, assessments, and other charges which may be imposed by authority of this State.

SECTION 4. The relinquishment made, the jurisdiction ceded, and the exemption from taxation granted by this Act, shall continue so long as the

premises herein specified shall remain in the occupancy of the above United States of America, for the purposes mentioned in the first section of this Act, and no longer.

California Code of Civil Procedure:

SEC. 322. *Occupation under written instrument or judgment, when deemed adverse.* When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property, under such claim, for five years, the property so included is deemed to have been held adversely except that when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract.

SEC. 323. *What constitutes adverse possession under written instrument or judgment.* For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved;

2. Where it has been protected by a substantial inclosure;

3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing-timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant;

4. Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

SEC. 324. *Premises actually occupied under claim of title deemed to be held adversely.* Where it appears that there has been an actual continued occupation of land, under a claim of title, exclusive of any other right, but not founded upon a written instrument, judgment, or decree, the land so actually occupied, and no other, is deemed to have been held adversely.

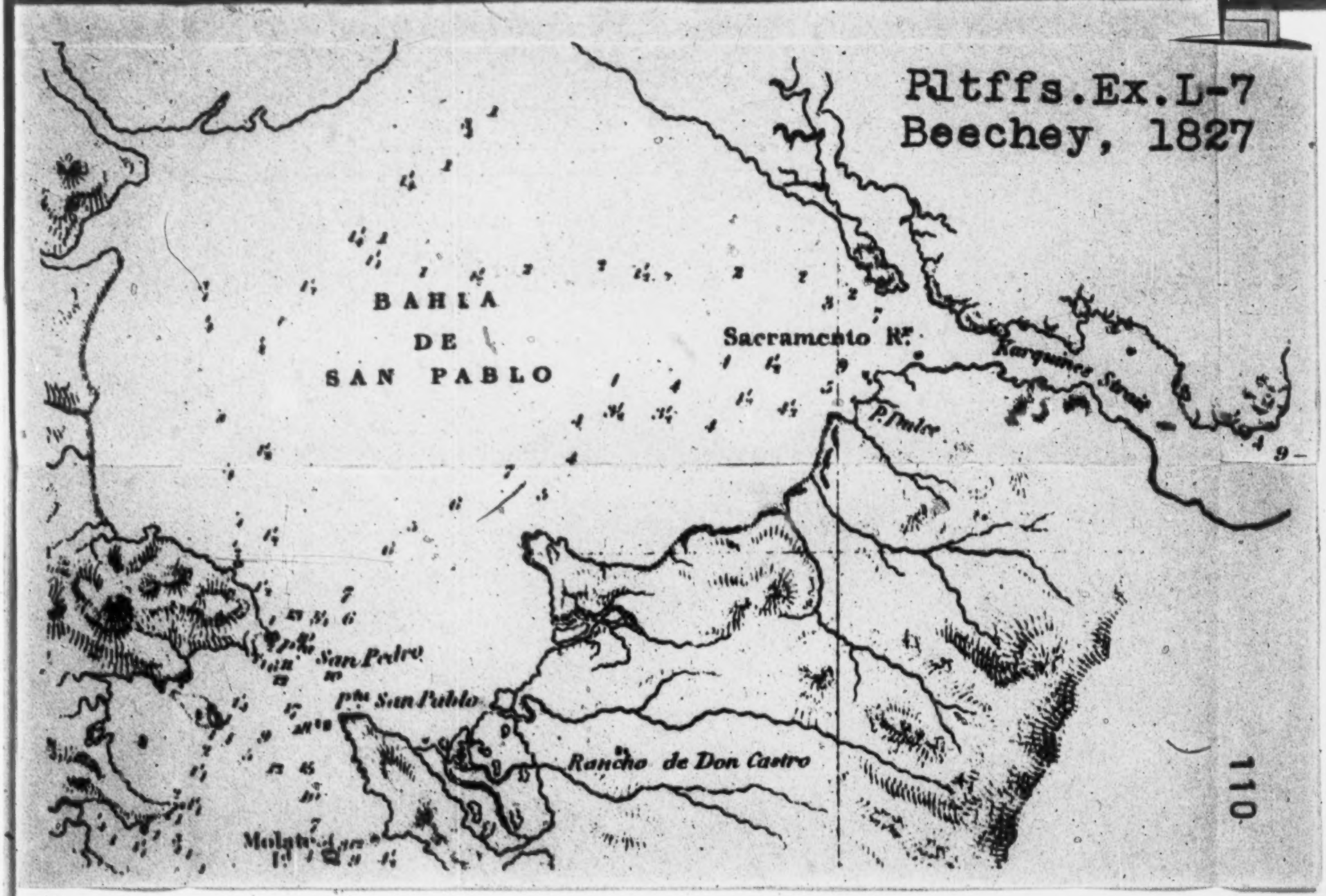
SEC. 325. *What constitutes adverse possession under claim of title not written.* For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:

1. Where it has been protected by a substantial inclosure.

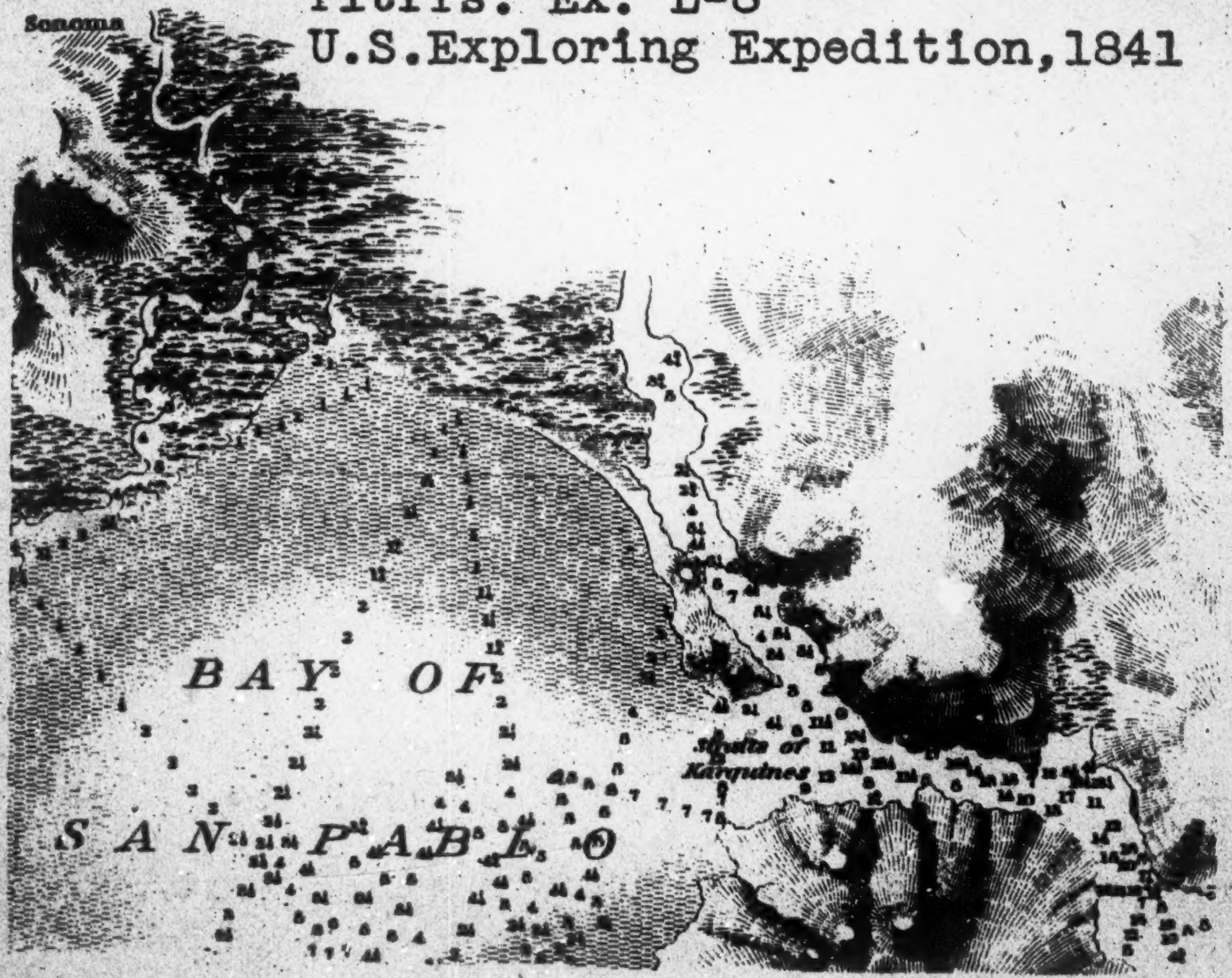
2. Where it has been usually cultivated or improved.

Provided, however, that in no case shall adverse possession be considered established under the provisions of any section or sections of this code, un-

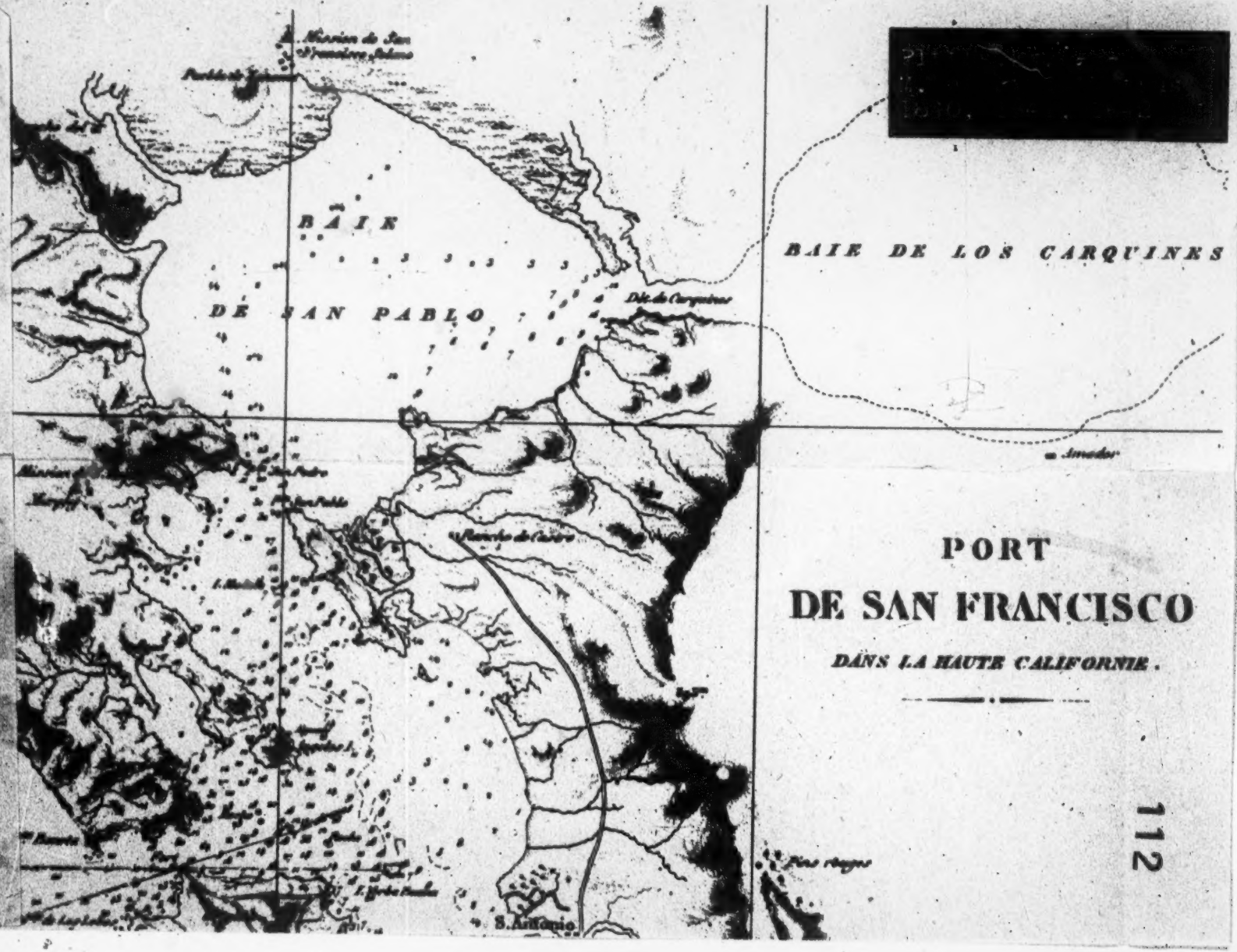
less it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county, or municipal which have been levied and assessed upon such land.


Pltffs.Ex.L-7
Beechey, 1827
BAHIA
DE
SAN PABLO
Sacramento R.
Karquines Strait
P. Pinole
San Pedro
Pta San Pablo
Rancho de Don Castro
110

Pltffs. Ex. L-8
U.S.Exploring Expedition,1841



111



PORT
DE SAN FRANCISCO

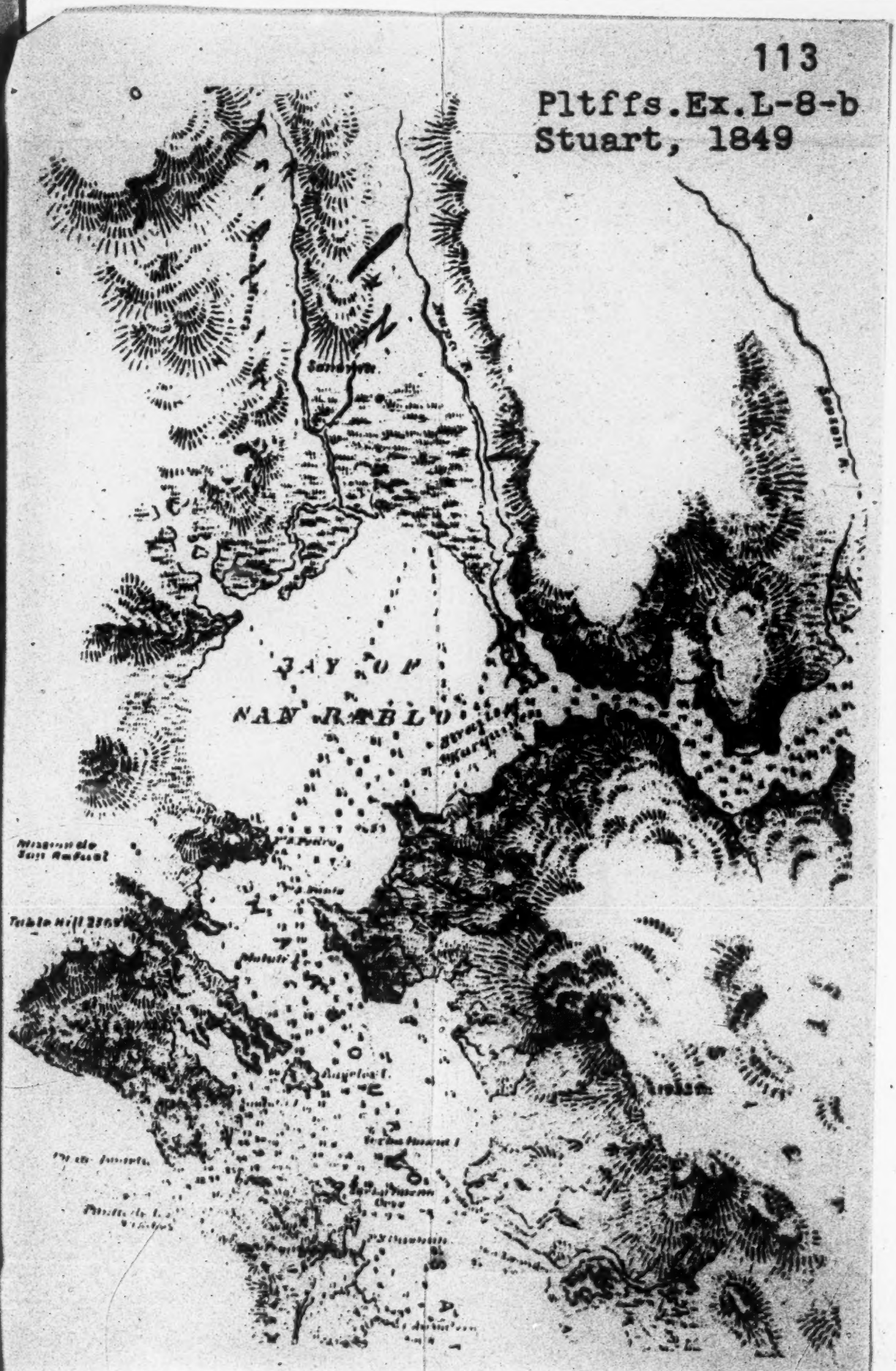
DANS LA HAUTE CALIFORNIE.

112

113

Pltffs.Ex.L-8-b

Stuart, 1849



Photograph(bromide) of the original Map in archives Coast & Geodetic Survey, Wash.,D.C. Div.Charts. June 28,1921.

Variation 15°46.5'E.

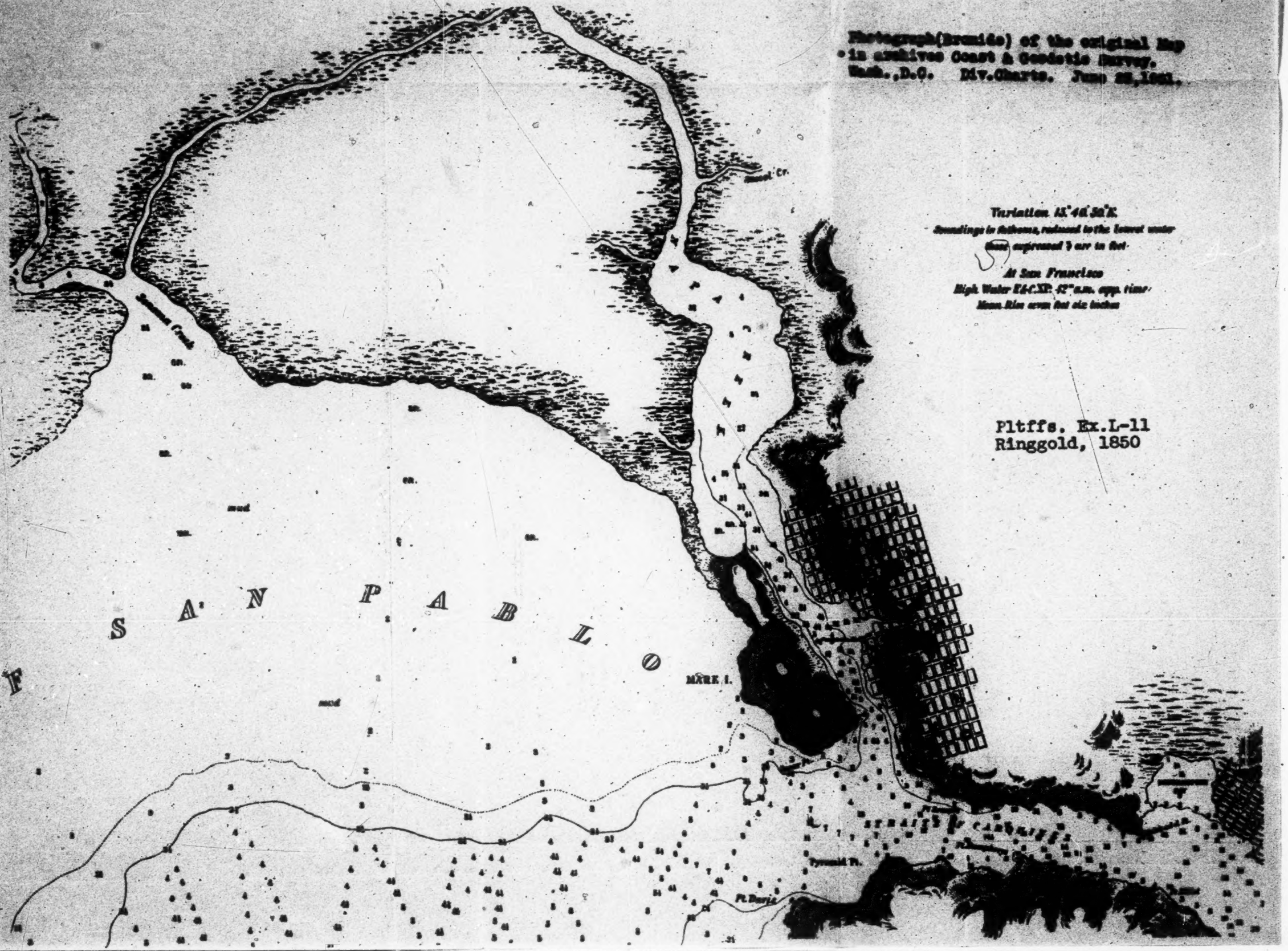
Soundings in fathoms, reduced to the lowest water [illegible] expressed 7 are in feet

At San Francisco

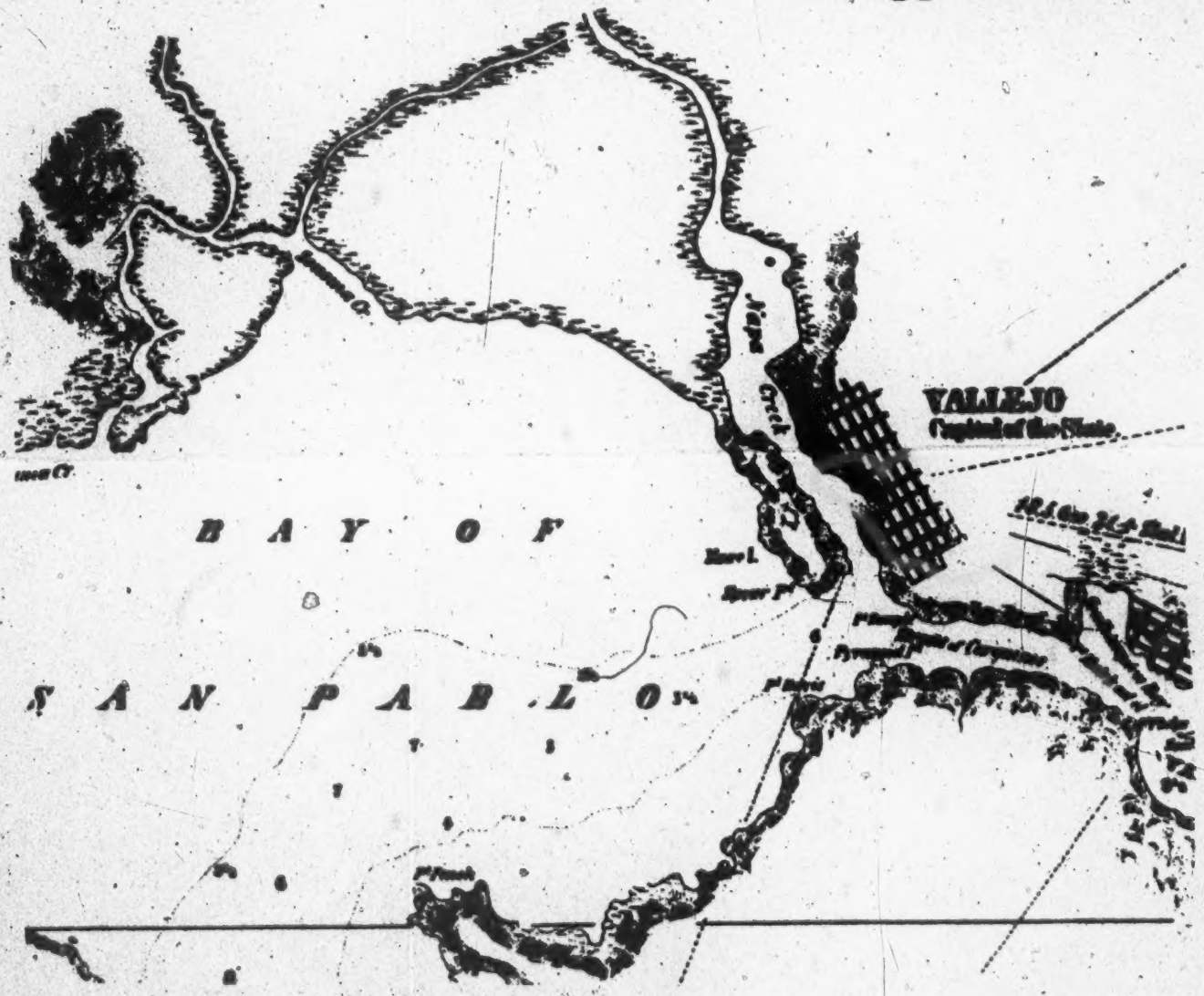
High Water 8h4.3P. 47" a.m. app. time

Mean Rise seven feet six inches

Pltffs. Ex.L-11
Ringgold, 1850



Pltffs.Ex.L-13
Ringgold, 1850



Pltffs Ex.L-17
U.S.Coast Survey 1851

U.S. COAST SURVEY
A.D. BACHE Superintendent

MARE ISLAND STRAITS

CALIFORNIA

Triangulation by J.S. Williams and R.D. Cutts Asstn. U.S.C.S. and Lt. S.P. Blunt U.S.N. Joint Comm.rs Army & Navy Officers
Topography by R.D. Cutts Asst. U.S.C.S.
Hydrography by the Party
under the command of W.P. Mc. Arthur
Lieut U.S.N. and Asst. U.S.C.S.
Scale 1/20000
1851

Part of Benicia

t of Vallejo

ent Government of California

Coast Pt.

Mare Island

Quarantine

M A R

B A Y O F S A N P A B L O

Notes

The Soundings were taken during November in the rainy season and represent the general depth of the water during that period, a reduction of 6 feet must be made for indicating the depths during the dry seasons (in summer)

The Soundings are expressed in feet. Only the characteristic Soundings are here given, there being so selected as best to show the form of the bottom. The curves of depth are indicated, thus ——— for 6 feet, thus ——— for 12 feet, thus ——— for 18 feet.

Abbreviations used in the bottoms of this Sketch
bnd. for hard
stk. for sticky
bu. for blue

Statute Miles

Pltffs. Ex. L-25
U.S.Coast & Geodetic
Survey 1863

Current Ebb
Mean Rise an
Mean.....d
Mean.....d
Mean Durati
Mean.....do.

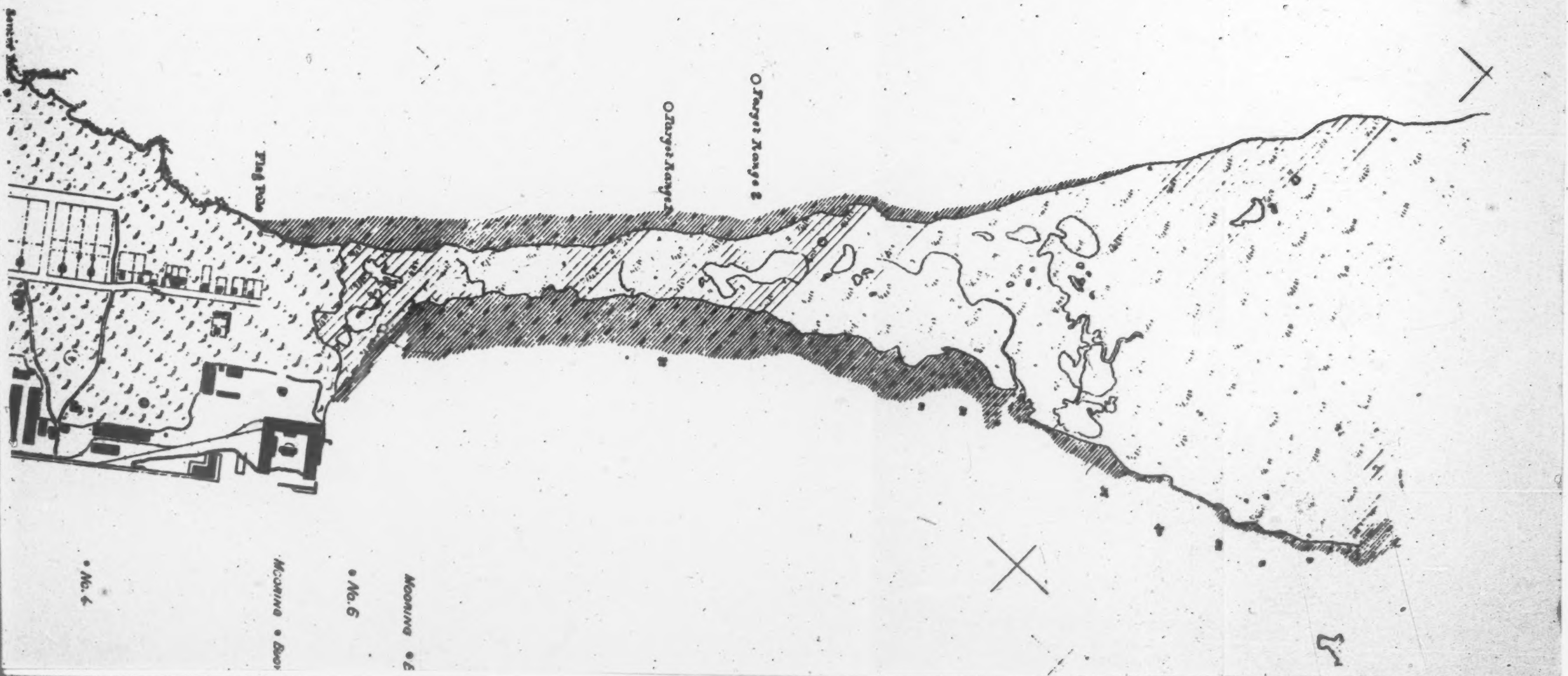
Difference in
When the Moo
Difference in
When the Moo
Difference in
When the Moo

The highest
the Moon's Sup,
5h 7m (Benicia)
high water.

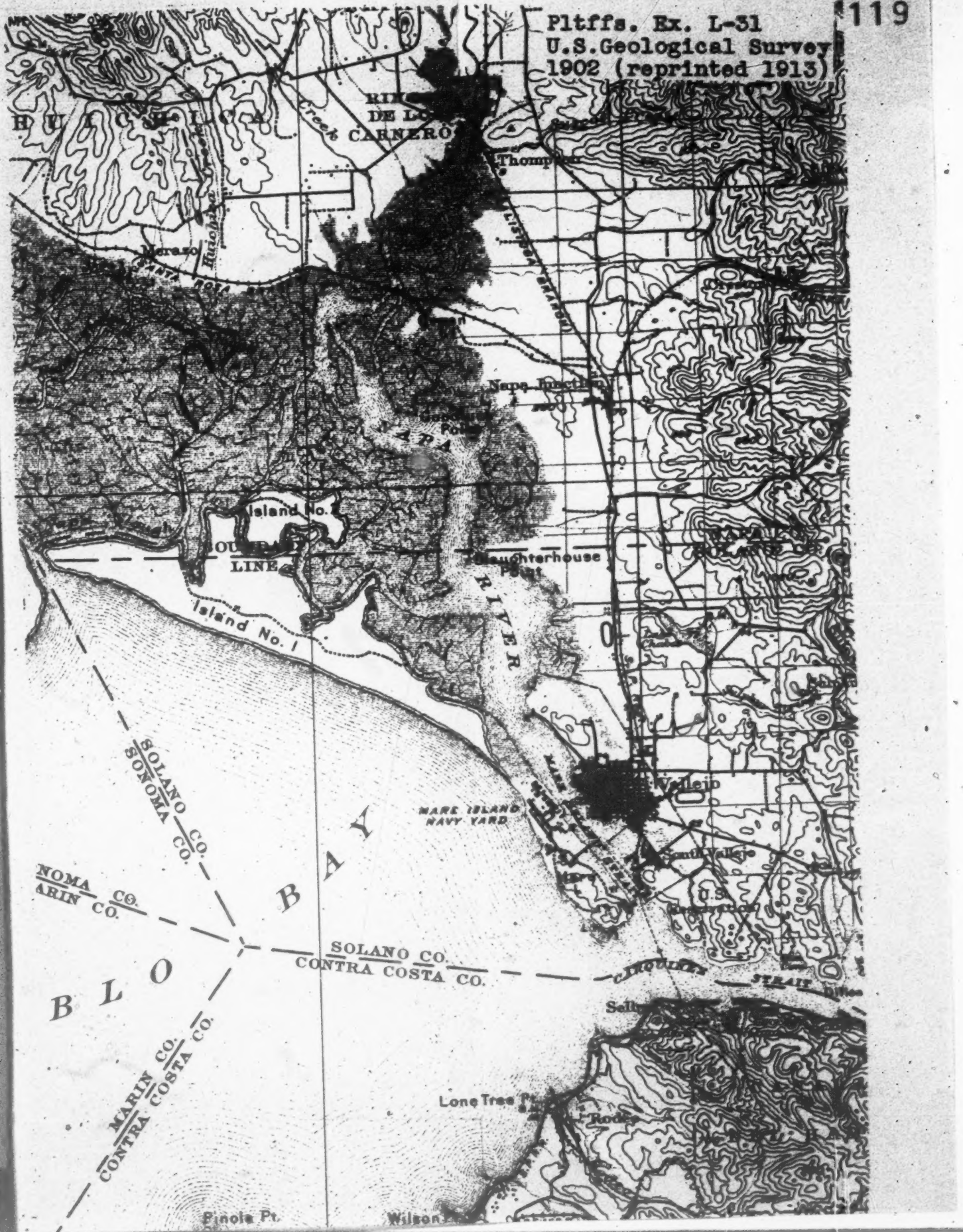
The Observa
in Nautical m

N A P A B L O

Pltffs. Ex. L-27
U.S.Coast & Geodetic Survey
Resurvey of San Pablo Bay 1886



Pltffs. Ex. L-31
U.S.Geological Survey
1902 (reprinted 1913)



LOW WATER LINE

TO HOLD

SLOUGH

TO BE CLOSED

DREDGER SPOIL - CONTRACT #1993

TO BE CLOSED

LAND

81

85

88

87

N

LEVEE BUILT BY DREDGING CONTRACTOR

TULE

APPROXIMATELY 100 ACRES EAST OF ROAD

BURNING GROUND FOR SCRAP

HIGH

DUMPS

OF

OLD

SALT GRASS

U.S.M.C. SKIRMISH RANGE

ROAD

LEVEE

ROAD

LINE

Defts. Ex. 3
Drawing of area North of
Navy Yard to be filled by
Dredger. May 22,1914.
Civil Engineer, U.S.N.

A-11000
A-10000
A-9000
A-8000
A-7000
A-6000
A-5000

RADIO
(5-450' TOWERS)

DUMP

DUMP

MARINE CORPS
RIFLE RANGE

AVIATION
LANDING FIELD

TIDAL SLOUGH

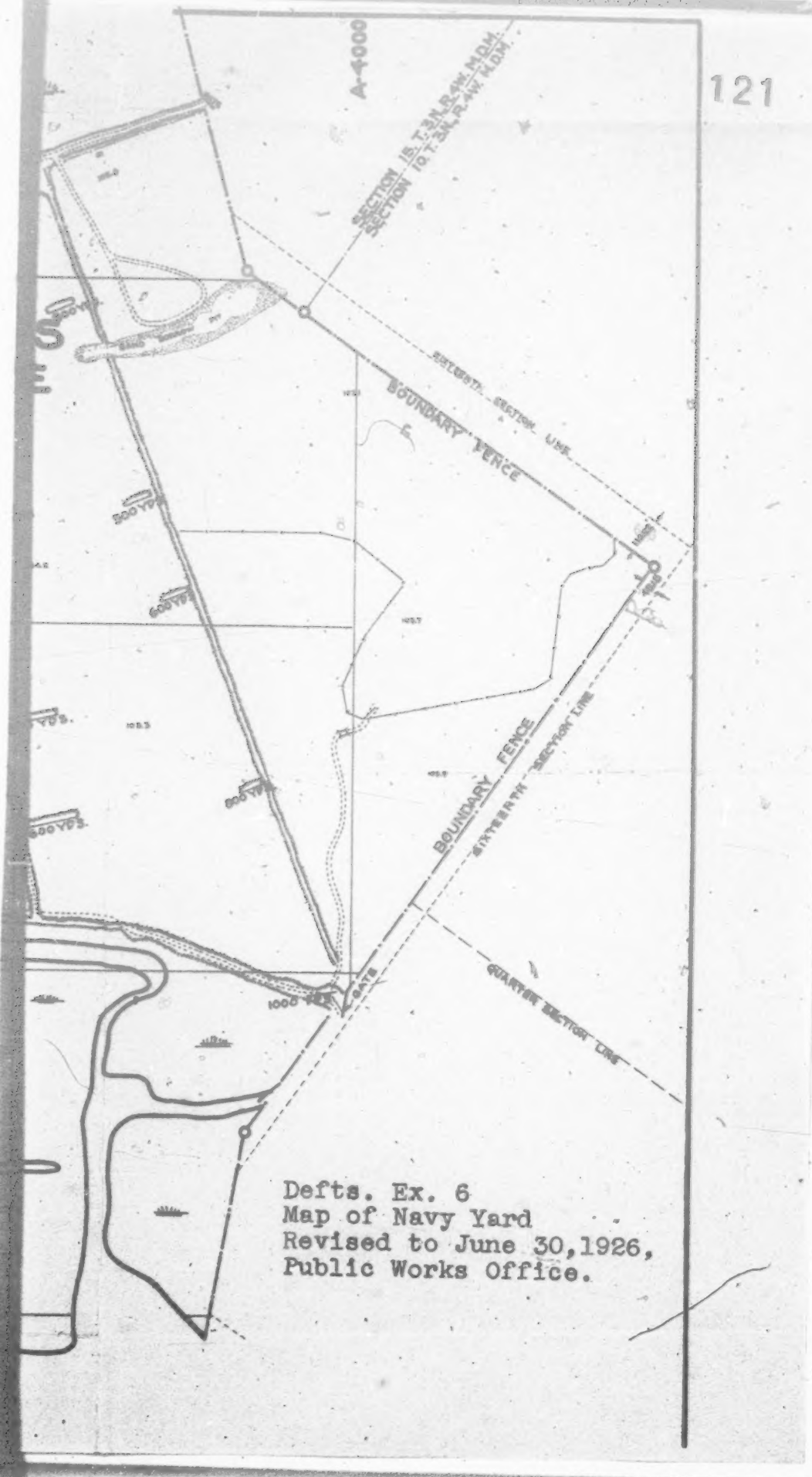
SUBMARINE
REPAIR
BASE

FREIGHT
WHARF

Dredge to 30'
Dredge to 35'
Dredge to 37'
Dredge to 20'

·LEGEND·

Ship's Berth
R.R. Track
Crane Track
Tidal Marsh
Fire Alarm
Dolphin



Defts. Ex. 6
Map of Navy Yard
Revised to June 30,1926,
Public Works Office.

SUPREME COURT OF THE UNITED STATES.

No. 487.—October Term, 1937.

United States of America, *vs.* James E. O'Donnell, et al. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[March 28, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

This case involves the validity of the title of the United States to a part of Mare Island in San Francisco Bay, which was reserved for public purposes by Presidential Proclamation in 1850, was selected by the Secretary as a navy yard pursuant to Act of Congress, was reserved for that purpose by Presidential Order in 1853, and since 1854 has been so used.

The lands in question are in the area acquired as a result of the Mexican War by the Treaty of Guadalupe Hidalgo, July 4, 1848, 9 Stat. 922, which guaranteed the property rights of Mexicans in the annexed territory. The United States claims under deed to it in 1853 by Bissell and Aspinwall and another, who derived their title under grant of May 20, 1841, by Alvarado, Mexican Governor of California, to Castro, a Mexican citizen, of the island La Yegu (Mare Island) "in all its extent". Respondents claim under a patent issued by California to Darlington in 1857, purporting to convey the land in question as a part of the swamp or overflowed lands granted to the state by the Swamp Lands Act of Congress, Sept. 28, 1850, c. 84, 9 Stat. 519.

Upon the military occupation of California during the Mexican War the United States military commander had proclaimed officially that Mexican land titles would receive due recognition by the United States,[1] and Art. 8 of the Treaty of 1848 with Mexico declared that the property rights of Mexicans in the annexed territory should be "inviolably respected." After the admission of California to statehood, September 9, 1850, Congress adopted the Mexican Claims Act of March 3, 1851, 9 Stat. 631, which established a Board of Land Commissioners with authority, upon petition of

[1] Proclamation to the Inhabitants of California, July 7, 1846, at Monterey, by Commodore John D. Sloat, 29th Cong., 2d Sess., House Doc. No. 4, pp. 644-645; Proclamation, August 17, 1846, at Ciudad de Los Angeles, by Commodore and Governor R. F. Stockton, *id.*, pp. 669-670.

those claiming under Mexican or Spanish grants of land in the annexed territory, to pass upon the validity of the grants. Right to a review of the Board's determination by the district court, and the Supreme Court of the United States, was allowed the claimants and the Government. By § 12 of the Act of August 31, 1852, 10 Stat. 76, 99, the Attorney General was given authority over appeals from decisions of the Board adverse to the interests of the United States.

Bissell and Aspinwall, the grantors of the United States, filed their petition before the Board, seeking confirmation of their title under the Castro grant of May 20, 1841. After hearing evidence the Board confirmed their title by decree of May 8, 1855. Upon appeal by the United States to the district court for northern California, the decree of the Board was affirmed. Appeal by the Government to the Supreme Court of the United States, allowed by the district court April 1, 1857, was dismissed by the Government in the same year. The decree of the district court was not signed or entered until a decree *nunc pro tunc* as of March 2, 1857, was signed, filed and entered on April 15, 1930.

While the proceedings were still pending before the Board, the claimants, Bissell and Aspinwall, on December 15, 1852, executed a contract to sell Mare Island to the United States, and on January 4, 1853, for a consideration of $83,491, they joined in a deed to the United States, without covenants except for further assurance. The deed purported to convey Mare Island, "including all the Tule or low land and marsh belonging to the same or which has ever been reputed or claimed to belong to the same . . ." On February 28, 1853, they executed a bond in favor of the United States in the sum of $200,000, conditioned upon the validity of their contract and the conveyance of "the entire and absolute fee simple Estate in the said tract of land known as Mare Island." The bond recited that they "shall at all times hereafter indemnify and save harmless the United States against any claim or title to the said tract called Mare Island and its appurtenances which may be set up by or through any person or persons claiming under Victor Castro and his assigns" and that they should "also indemnify and save harmless the United States against any adverse claim or title in any other person or persons or body politic which may within two years from the date hereof, be made and thereafter be successfully established".

The 1857 California patent to Darlington was not recorded until June 6, 1879, when one Sawyer appears to have acquired the Dar-

lington claim. See *Sawyer* v. *Osterhaus*, 212 Fed. 763, 767. The Secretary of the Interior having found that the lands in question were swamp lands within the Swamp Lands Act of 1850, the respondents in 1928 by mandamus compelled the Secretary to certify the lands for patent to the State of California. The court, in awarding the relief sought, at the same time declared with reference to the contentions made here, "the mere issuance of patent to California determines no legal or equitable right of the United States in the premises." *Work* v. *United States ex rel. O'Donnell*, 23 F. (2d) 136, 138.

The present suit was brought by the United States in the district court for northern California to quiet its title. Respondents, by their answer, put in issue the Government's ownership of the lands in question and asserted their title as tenants in common under the Darlington grant. They specifically challenged the existence and validity of the Castro grant, the validity of the decrees of confirmation of the title of Bissell and Aspinwall, and any prescriptive title of the United States. They prayed, as affirmative relief, that their title be quieted, and in support of their prayer alleged that the lands in question were not embraced in the Castro grant and also were swamp lands which had passed to California under the Swamp Lands Act.

The trial court made findings of fact and reached conclusions of law in favor of the United States on all these issues. Upon appeal, the Court of Appeals for the Ninth Circuit reversed and decreed "that the United States has no title to the patented lands in suit, and that the title is in and quieted in" respondents. 91 F. (2d) 14. The Court of Appeals found that Alvarado, the Mexican Governor of California, had executed the purported grant of Mare Island to Castro, including the land in question, but made no finding with respect to the adverse possession of the United States found by the district court. It held that the paper signed by Alvarado was incompetent evidence of the grant to Castro because of the lack of filing or recordation of the grant in the Mexican archives, see *Berreyesa* v. *United States*, 154 U. S. 623, and that the decrees of the Board of Land Commissioners and of the district court on appeal from the Board, confirming the Castro title, were null and void and worthless as evidence because the United States had purchased the interest of the claimants Bissell and Aspinwall while the proceedings were pending before the Board. It characterized the proceeding as collusive and the action of the United

States in acquiring title during its pendency as breach of a trust duty assumed under the Swamp Lands Act to convey swamp lands to California, and as in effect a fraud upon the state. It rejected the contention of the United States that the pending Board proceeding for confirmation of the Castro grant withdrew the land in question from the operation of the Swamp Lands Act, which is the source of California's and respondents' alleged title to the land, and held that the reservations of the land made by Presidential proclamations for military and naval purposes were ineffective, because California had previously acquired an inchoate title under the Swamp Lands Act.

Respondents renew here the contention made below, based on an elaborate review of the evidence, that the swamp or overflowed lands in question were below high tide and were not within the exterior boundaries of Mare Island as it was known at the time of the Castro grant, and so were not intended by the grantor to be, and were not in fact, included in the description of the grant. Resolution of this issue turns upon appraisal of the evidence and the inferences to be drawn from it. As both courts below have found against respondents on this issue we shall not reexamine the evidence here. We accept the concurrent findings as establishing the fact that the lands in question were within the description of the deed to Castro. *United States* v. *State Investment Co.*, 264 U. S. 206, 211; *Shappirio* v. *Goldberg*, 192 U. S. 232; cf. *Page* v. *Rogers*, 211 U. S. 575; *Washington Securities Co.* v. *United States*, 234 U. S. 76; *National Bank* v. *Shackleford*, 239 U. S. 81; *Risty* v. *Chicago, R. I. & P. R. Co.*, 270 U. S. 378.

Nor is the fact that a patent has issued to California, in obedience to the judgment in the mandamus proceeding brought by respondents in *Work* v. *United States ex rel. O'Donnell, supra*, decisive of any issue presented here. Upon the Secretary's approval of the survey of the land in question by the United States Surveyor General for the State of California, showing the lands to be swamp and overflowed at the date of the Swamp Lands Act, and the determination by the Secretary that the lands in question were then swamp and overflowed, it became his duty under the Swamp Lands Act, and under the Act of Congress of July 23, 1866, 14 Stat. 218, to certify the lands for patent to the State. See *Tubbs* v. *Wilhoit*, 138 U. S. 134. But the adjudication in mandamus that it was the duty of the Secretary to issue the patent under these

acts, and the issuance of it, determined no legal or equitable right of the United States in the premises. It remains open to the United States in this or any other appropriate proceeding, to show that the lands did not pass under the Swamp Lands Act. *United States* v. *Schurz*, 102 U. S. 378, 404; *Emelting Co.* v. *Kemp*, 104 U. S. 636, 641, 646; *United States* v. *Conway*, 175 U. S. 60, 68, and cases cited; see *Work* v. *United States ex rel. O'Donnell, supra*, 137, 138.

We accordingly direct our attention to the question, deemed pivotal below, whether, as the Court of Appeals held, the confirmation of the title of Bissell and Aspinwall under the Castro grant by the Board of Land Commissioners was invalid, so that the United States neither reserved nor acquired a title valid as against the State of California and respondents who claim under her. In answering, it will be an aid to adequate understanding of the points in issue to consider first the effect of the confirmation by the Board, without reference to the alleged collusion and fraudulent action of the United States or any of its officers.

The Swamp Lands Act of 1850 was effective to transfer an interest in the lands described in the Act, only so far as they were part of the public domain of the United States and thus subject to the disposal of Congress. The Act in terms purported to grant to the several states all swamp and overflowed lands located within their respective boundaries "which shall remain unsold at the passage of this Act." Section 2 made it the duty of the Secretary of Interior "to make out an accurate list and plats" of the lands described by the Act and to "cause a patent to be issued to the state therefor". The effect of these provisions was to invest the state *in praesenti* with an inchoate title to those lands falling within the description of the Act, to be perfected as of the date of the Act when the land should be identified and the patent issued as provided by § 2. *Wright* v. *Roseberry*, 121 U. S. 488; *United States* v. *Minnesota*, 270 U. S. 181, 202-203. By its terms the Swamp Lands Act did not include swamp lands which the Government had sold, and it could not include lands which the Government had not acquired or free any of them of obligations to which they were subject when the Act was passed. *United States* v. *Minnesota, supra*, 206.

It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose. *Wilcox* v. *Jackson*, 13 Pet. 498, 513; *Missouri, K. &*

T. R. Co. v. *Roberts*, 152 U. S. 114, 119; *Scott* v. *Carew*, 196 U. S. 100. This has been held to be the case even though the appropriation be afterwards set aside. *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 741, 745; *Newhall* v. *Sanger*, 92 U. S. 761. The general words of the granting act are to be read as subject to such exception. *Scott* v. *Carew, supra*, 111, 112; *Louisiana* v. *Garfield*, 211 U. S. 70, 77; *United States* v. *Minnesota, supra*, 206.

Swamp lands in California, being a part of the territory annexed by the Treaty of Guadalupe Hidalgo, were subject to all obligations imposed upon the United States with respect to them under the principles of international law by reason of the annexation, and by its treaty obligations.[2] Article 8 of the treaty stipulated that Mexicans then established in the annexed territory should retain their property within that area, and that property belonging to Mexicans not established there should be respected. The protocol of May 26, 1848, interpretative of the treaty, which preceded the exchange of ratifications on May 30, 1848, declared that the grants of land made by Mexico in the ceded territory "preserve the legal value which they may possess, and the grantees may cause their legitimate [titles] to be acknowledged before the American tribunals", and that "Conformably to the law of the United States, legitimate titles to every description of property, personal and real, existing in the ceded territories are those which were legitimate titles under the Mexican law in California . . . up to the 13th of May, 1846 . . ." 61st Cong., 1st Sess., Sen. Doc. No. 357, pp. 1119-1120.

The obligations thus assumed by the United States antedated the Swamp Lands Act and were superior to any rights derived from the United States under that act. The obligations were political in character, to be discharged in such manner and upon such terms as the United States might deem expedient in conformity to its treaty obligations. *Beard* v. *Federy*, 3 Wall. 478; *Grisar* v. *McDowell*, 6 Wall. 363, 379; *San Francisco* v. *LeRoy*, 138 U. S. 656;

[2] The obligation imposed by the principles of international law to respect property rights within annexed territory is substantially that recognized by the treaty, Soulard v. United States, 4 Pet. 511; United States v. Percheman, 7 Pet. 51, 87; Strother v. Lucas, 12 Pet. 410, 436; United States v. Repentigny, 5 Wall. 211, 260; Knight v. United States Land Ass'n., 142 U. S. 161, 184, and comprehends not only formal grants "but also any concession, warrant, order or permission to survey, possess or settle, whether evidenced by writing or parol, or presumed from possession". Strother v. Lucas, *supra*, 436; see Soulard v. United States, *supra*.

Knight v. *United States Land Ass'n.*, 142 U. S. 161, 183, 184. While the treaty provided that the claimants under Mexican grants might cause their titles to be acknowledged before American tribunals, it was silent as to the mode of selection or creation of such tribunals. The United States was left free to provide for them in its own way. Cf. *United States* v. *Ferreira*, 13 How. 40, 45. It could relegate all the multitude of claims under the Mexican grants to the ordinary procedure of courts with the inevitable delays and confusion affecting land titles in the vast annexed area. See *Beard* v. *Federy*, *supra*, 493. It could set up an administrative tribunal acting by a more summary procedure[3] designed to establish with finality the status of all the Mexican grants as of the date of annexation. It chose the latter course by the creation of the Board of Land Commissioners, by the Act of March 3, 1851.

Under that Act the General Land Office was required to issue a patent for all claims finally confirmed "by the said commissioners, or by the said District or the Supreme Court". The act declared that final decision of the Board, or the district or the Supreme Court should "be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons." Lands, the claim for which should be finally rejected, and lands, claims to which should not be presented to the Board within two years of the date of the act were to be "deemed, held, and considered as part of the public domain".

The primary purpose of the Mexican Claims Act was the performance by the United States of its treaty obligations to quiet the titles of the claimants under Spanish and Mexican grants. But a necessary consequence of proceeding before the Commission, and one incidental to the determination of the validity of the titles of such claimants, was a determination whether, by the cession, the lands in question had become a part of the public domain of the United States. It is evident that the treaty obligations to quiet the title of claimants under Mexican grants would be defeated and the Mexican Claims Act would fail of its purpose if the finality of the Board's confirmation of claims under Mexican grants could be challenged by persons claiming under grants of public lands by the United States. For that reason it has been consistently held that claimants under the United States, by virtue of statutes disposing of its public lands in California, are not "third persons" within the meaning of the Mexican Claims Act, and that confirma-

[3] As to the number of the claims and the celerity with which they were disposed of, see 8 Op. Atty. Gen. 515.

tion under that act of claims under Mexican grants is conclusive upon all those claiming under the United States. *Beard* v. *Federy, supra,* 493; *More* v. *Steinbach,* 127 U. S. 70; *San Francisco* v. *LeRoy, supra; Knight* v. *United States Land Ass'n., supra,* 184; *Ward* v. *Mulford,* 32 Cal. 365, 370; *People* v. *San Francisco,* 75 Cal. 388, 400; cf. *United States* v. *Coronado Beach Co.,* 255 U. S. 472, 488. Such is the effect of confirmation by the Board of titles set up under Mexican grants, upon claimants under the Swamp Lands Act to lands in the annexed territory. That the Swamp Lands Act antedated the Mexican Claims Act and the confirmation of titles under it, is immaterial; for those claiming under the Swamp Lands Act took *cum onere*—subject to the treaty obligations of the United States and whatever procedure the United States might adopt in performance of those obligations for the quieting of titles under Mexican grants. Confirmation when made was as effective and conclusive upon all patents under the Swamp Lands Act as if made at the date of the treaty. *San Francisco* v. *LeRoy, supra,* 670; *Knight* v. *United States Land Ass'n., supra,* 185; *Ward* v. *Mulford, supra,* 370.

We do not stop to discuss the point, much argued at the Bar and in the briefs, whether the decree of the district court affirming the Board's decree of confirmation was void or otherwise defective because not signed at or about the time it was rendered. See *Mitchell* v. *Overman,* 103 U. S. 62, 64-65; *In re Wight,* 134 U. S. 136; *United States* v. *Stollar,* 180 Fed. 910, 912, 913; *International Harvester Co.* v. *Carlson,* 217 Fed. 736, 738. If it be taken that the Government has failed to prosecute its appeal to final decree in the district court, it is enough that the decree of the Board has never been set aside or otherwise disturbed. If the appeal was not still pending when the decree of the district court was entered *nunc pro tunc* in 1930, the decree of the Board remains as effective as if no appeal had been taken, and has become final and conclusive within the provisions of the Act. *Beard* v. *Federy, supra; United States* v. *Ritchie,* 17 How. 525.

Apart from the considerations growing out of the purchase by the Government of the Bissell and Aspinwall title, now to be discussed, the decree of the Board, if not that of the district court, must be taken as conclusive on respondents, and as to them it is not open to this or any other court to reexamine the existence or validity of the Castro grant.

The holding of the court below that the acquisition by the United States of the title of Bissell and Aspinwall, while their claim was pending before the Board of Land Commissioners, involved a breach of equitable duty to California of such character as to preclude the Government from taking any advantage of the Board's confirmation of the Castro grant, is predicated upon the assumption that by virtue of the Swamp Lands Act the United States became in effect the trustee of the lands in question for the benefit of the state and its successors in interest. It is true that in a loose and general sense the United States, pending issuance of a patent under other land grant acts, has been referred to as a trustee of lands to be patented, *Cornelius* v. *Kessel*, 128 U. S. 456, 460-1; *Benson Mining and Smelting Co.* v. *Alta Mining and Smelting Co.*, 145 U. S. 428, 432; *Orchard* v. *Alexander*, 157 U. S. 372, 383; *United States* v. *Anderson*, 194 U. S. 394; *Knapp* v. *Alexander-Edgar Lumber Co.*, 237 U. S. 162; *Payne* v. *New Mexico*, 255 U. S. 367, and the right of the state, before patent, to lands within the purview of the Swamp Lands Act has been referred to as "equitable". *Michigan Land and Lumber Co.* v. *Rust*, 168 U. S. 589, 591; *Brown* v. *Hitchcock*, 173 U. S. 473, 476.

Even where the right of the state under the Swamp Lands Act is unqualified, it would perhaps be more accurate to say that the United States is no more than a donor granting without warranty those lands falling within the description and the purview of the statute, subject to a duty imposed by the statute, to perfect by survey and patent such inchoate title as it had conveyed to the state. Beyond this the United States, by the enactment of the Swamp Lands Act, assumed no duty. It gave no warranty of title. It assumed no obligations to the grantee subjecting itself to other claims of equitable duty. Sale of the lands to others does not make it accountable as a trustee of the proceeds. *United States* v. *Louisiana*, 127 U. S. 182, 191. In any case, the duty assumed by the United States under the treaty and the concomitant power thus reserved to it, was inconsistent with the assumption of trust duties toward the state by reason of the Swamp Lands Act. In the execution of that duty it was free to adopt any mode of procedure it saw fit for adjudication of the titles of claimants under Mexican grants. Even after the submission of their claims to the Board of Land Commissioners it could withdraw them from decision of the Board and courts and adjudicate them by Congressional action. *Grisar* v. *McDowell*, *supra*, 379. The tentative recognition by the treaty of the rights of

the Mexican grantees and the full latitude which the Government had reserved to itself in the choice of modes of disposition of those claims, were incompatible with the assumption of trust duties by the Government with respect to them pending their final disposition. There is thus a complete absence of support for the supposed analogy between a sovereign government, in such circumstances, and a private grantor who has conveyed with warranty of title or who has undertaken by executory contract to convey title which he possesses or subsequently acquires and who, because he has thus assumed equitable duties, is sometimes spoken of as a trustee.

The Mexican Claims Act itself neither imposed nor recognized such duties. In authorizing the Board to pass on claims presented to it upon the evidence adduced by the claimant and the United States, it required no notice to be given to any third party. It gave to the Government the right to representation by an agent and made it his duty to collect testimony "in behalf of the United States," and to attend meetings of the Board. But the rôle of the Government was not that of a litigant. It was rather, as the Act itself declared, supervisory: "to superintend the interests of the United States" in the performance, through an administrative agency, of its treaty obligation to ascertain for the Mexican claimants, and for itself, what lands had been withdrawn from the public domain by the Mexican grants. "The United States did not appear in the courts as a contentious litigant; but as a great nation, acknowledging their obligation to recognise as valid every authentic title, and soliciting exact information to direct their executive Government to comply with that obligation." *United States* v. *Fossatt*, 21 How. 445, 450, 451.

At no stage of the Government's dealing with the titles under Mexican grants, either under the Swamp Lands Act or under the Mexican Claims Act, can we find the assumption on the part of the Government of any duty toward the state with respect to the swamp and overflowed lands other than that specified in the Swamp Lands Act itself, and that duty was fully performed when it issued to the state its patent to the lands in question in response to the mandate in *Work* v. *United States ex rel. O'Donnell, supra.*

We turn now to the consideration of the circumstances relied on to establish the proposition that the title now asserted by the United States was acquired as the result of a purposeful or conscious scheme to deprive the state of possible benefits under the Swamp Lands Act by means of collusive proceedings before the

Board of Land Commissioners and the district court. At the outset it is to be noted that this contention first emerges in this case in the opinion of the Court of Appeals below. There had previously been no suggestion of such a contention in any pleading or assignment of error, nor had the Government or its officers been charged with any fraud, collusion, concealment, or bad faith. The respondents, in seeking affirmative relief, made no assertion of that character. In such a state of the record, dereliction of officers of the United States in the performance of official duty is not lightly to be inferred seventy-five years after the event, and a court should be slow to find what would be in effect a fraudulent conspiracy on their part to deprive the state of the benefits of the Swamp Lands Act.

Upon the selection of Mare Island as a navy yard by the Secretary of the Navy, Mr. Crittenden, then Attorney General, had given an opinion to the effect that Mare Island was a part of the public domain subject only to the Castro grant, the claim under which was then pending before the Board of Land Commissioners. He concluded that there was sufficient basis for the claim to justify purchase of the claimant's title, which he recommended as a protection of the interests of the Government. See Opinion of Attorney General Cushing given to the Secretary of the Navy, April 9, 1853. 8 Op. Atty. Gen. 422. Then followed the purchase from Bissell and Aspinwall, in the circumstances already detailed. Those circumstances justify no inference that the defense of their claim was dishonest. The Government had far more to gain than to lose by defeating the Castro grant. As the grant covered the island "in all its extent," both upland and swamp, rejection of the claim would not only have given to the Government a return of the purchase price and expenses as guaranteed by its bond for title, but would have established its right to the entire island as a part of the public domain, except perhaps the swamp land. Cf. *Newhall* v. *Sanger, supra.* The validity of the Castro grant was the only matter with respect to which the Board could render a decree which, under the procedure of the Mexican Claims Act, could become final and conclusive as to the claimant and the Government. So far as appears, each was as much concerned with the determination of that question after as before the Bissell and Aspinwall deed and bond, for accordingly as it was decided one way or the other, the one or the other stood to gain an amount equal to the purchase price of the property. The reasonableness of the

purchase price is not challenged. The only effect of the deed and bond was to protect the Government against loss of the opportunity to acquire the land for a navy yard in case the property should be disposed of to some third person pending the Board's decision, and the Castro grant should be upheld.

Upon the opinion of Attorney General Cushing, already mentioned, the Court of Appeals placed its chief, indeed its only reliance for the conclusion that there was conscious dereliction on the part of the Government. In this opinion the Attorney General spoke of the Government's purchase of the Bissell and Aspinwall title as an accomplished fact, but nevertheless recommended that the claim be vigorously contested. This is said to be so inconsistent with the Government's dismissal of its appeal four years later as to indicate a "purposeful shift of position" to the detriment of the state, from which bad faith is to be inferred. But an attentive reading of the opinion in the light of subsequent events reveals no such inconsistency. In repudiating any thought that the claim should not be contested, he declared: "But I, as Attorney General, in view of the special duties imposed on me by the acts for settlement of private land claims in California, and of my general obligation to look after the rights of the United States in the premises, cannot pursue this course. I must not admit that the purchase of the Castro claim by the United States operates in any way, either by implication or otherwise, as a waiver of the general rights of the United States in the premises, or as an assent, either express or implied, to the pretended validity of the grant to Castro". He pointed out that the claim "involves difficult and important questions of law, which the Commissioners, to be sure, have decided in favor of the claimants,[4] but which the Supreme Court may decide otherwise", and that he felt bound to protect the interests of the United States by an appeal because as a precedent the case would affect "many millions worth of land in California, which is otherwise public domain."

After pointing out that the State of California retained title to tide land below high water mark, and that the United States could not enjoy the use of Mare Island as a naval depot while its shores belonged to the state, he concluded with the recommendation that

[4] The reference is obviously to claimants other than Bissell and Aspinwall, for at that time there had been no hearings by the Board on the claim of the latter and the Board had rendered no decision with respect to it.

"California be invited to relinquish to the United States whatever claim, if any, she may have to the shores or the overflowed land of Mare Island." The opinion discloses that he had no thought of depriving the state of any rights which it might have under the Swamp Lands Act for it affirmatively shows that he was of opinion (erroneously as was later decided in *Beard* v. *Federy, supra,* and cases following it), that no rights of California under the Swamp Lands Act would be affected by the decisions of the Board.

With but little research it becomes apparent that the important questions of law affecting "many millions worth of land in California", which were involved in the Bissell and Aspinwall claim and which the Commissioners had already decided in other cases, were unrelated to any rights of the state under the Swamp Lands Act, and were in fact decided against the Government by this Court after the Attorney General had rendered his opinion and before the dismissal of the Government's appeal from the decree of the district court in the Bissell and Aspinwall case.[5] The opinion evidences the strongest motives on the Government's part to contest the Bissell and Aspinwall claim, and the firm determination to prosecute the contest with vigor. The record of the proceedings before the Board plainly shows adherence to this purpose. Witnesses were produced by the Government to discredit the Castro grant; those produced by the claimants, including Alvarado who testified to his execution of the grant, were so vigorously cross-examined as to excite the Board's "strong suspicion" as to the

[5] Of the "difficult and important questions of law" which were said in Attorney General Cushing's opinion to the Secretary of the Navy to be involved in the claim of Bissell and Aspinwall, one, mentioned in the letter itself, was whether a grant by a Mexican governor was valid in the absence of approval by the "Departmental Deputation". This question was answered in the affirmative by the Board, December 27, 1852, in passing on the Fremont claim; January 5, 1853, in the Larkin case; and in preliminary opinions in the Cervantes and Reading cases, rendered August 3, 1852, and August 9, 1852, respectively. This Court agreed with the Board on the general proposition, in Fremont *v.* United States, 17 How. 542, 563 (March 10, 1856); United States *v.* Reading, 18 How. 1, 7-8 (January 11, 1856); United States *v.* Larkin 18 How. 557, 563 (May 12, 1856). A special rule to the contrary was later pronounced as to island grants in United States *v.* Osio, 23 How. 273, decided March 12, 1860, but it cannot be said from the present record whether that rule was applicable to the Castro grant.

Also involved in the claim of Bissell and Aspinwall were five other questions, each of which had been decided by the Board before the Attorney General's opinion of April 9, 1853, and before the Board's later confirmation of the Bissell and Aspinwall claim. Each was decided by this Court against the Government before its dismissal of the appeal which it had taken April 1, 1857, from the district court's affirmance of that confirmation. The questions were:

(a) Whether the Mexican provincial governors had power to grant lands. It was decided in the affirmative in the preliminary opinion on the Cervantes

authenticity of the Castro grant, which it nevertheless sustained in the light of all the evidence. Only after the "important questions of law" had been decided by this Court against the Government did it relax its efforts. Its change of position then, though purposeful, can hardly be said to be evidence of bad purpose.

The deed of Bissell and Aspinwall to the government was recorded in Solano County, California, April 18, 1853. The opinion of Attorney General Cushing was on October 3, 1853 transmitted by the Secretary of the Navy to the Governor of California who submitted it to the California Legislature January 4, 1854. California Senate Journal, 1854, 37; Appendix, Doc. No. 4. Being then fully advised by that opinion of the Government's purchase of the Bissell and Aspinwall claim and of its purpose to press for a determination of the validity of the Castro grant by the Board of Land Commissioners, the California Legislature by Act of May 11, 1854, Cal. Stat. 1854-1855, c. 43, pp. 48-49, consented to the purchase of Mare Island for the purpose of establishing there a navy yard and proclaimed that all the lands within its limits were to be perpetually free of state taxation. It ceded to the Government lands on the island which are not here involved, with the proviso that the consent to the purchase and the cession to the government should not "be construed in aid or support, directly or impliedly, of any conveyance or bond for title to the United States of the same lands

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claim, rendered by the Board August 3, 1852, and in a number of subsequent decisions, and was settled by this Court March 5, 1857, in United States *v.* Peralta, 19 How. 343.

(b) Whether the Mexican governors had power to grant any lands within ten leagues of the seacoast—the so-called littoral league question. It was decided adversely to the Government in a preliminary opinion in the Cervantes case, rendered by the Board August 3, 1852, and was settled by this Court May 12, 1856, in Arguello *v.* United States, 18 How. 539, and United States *v.* Cervantes, 18 How. 553.

(c) Whether the grantee's failure to furnish a map (*diseno*) with his petition for a grant, constitutes a fatal defect in title. It was decided by the Board adversely to the Government in the Fremont case, December 27, 1852, and was settled by this Court March 10, 1855, in Fremont *v.* United States, *supra.*

(d) Whether a grant is void for want of a condition requiring the grantee to take possession of and cultivate the land within a certain time. It was decided by the Board in the negative in the Larkin case, January 3, 1853, and was settled by this Court May 12, 1856, in United States *v.* Larkin, *supra.*

(e) Whether a grant is void for want of a clause informing the grantee that it would become indefeasible only after approval by the Departmental Deputation. It was involved in the Larkin claim, confirmed by the Board January 3, 1853, and was settled by this Court May 12, 1856, in United States *v.* Larkin, *supra.*

Chronological data have been secured from Hoffman's Land Cases, Appendix, and from the records filed in this Court in the cited cases.

heretofore made, or which may hereafter be made . . . or as a recognition on the part of the State of California of any claim, title or grant heretofore asserted or set up, or which may hereafter be asserted or set by any person or persons . . .'' The only bond for title then relating to Mare Island which is disclosed by the record was that of Bissell and Aspinwall, and the apparent purpose of the proviso was that the state's consent to the purchase should not enure to the benefit of Bissell and Aspinwall or any others in like situation, so as to relieve them from the obligation on their bond in the event that the Castro grant should be held invalid by the Board of Land Commissioners. Occupation of the island by the United States as a naval station followed in September, 1854. The Board rendered its decree of confirmation of the Castro grant May 8, 1855. The following memorandum appears among the papers in the case in the district court: ''The United States being now the owner of the titles of appellees, a confirmation of this claim enures to the benefit of the Government and no objection is therefor made to a decree in favor of the validity of the claim.''

Thus, instead of action covertly taken by the Government with the purpose of depriving the state of any of its rights in the premises, we find high officers of the Government proclaiming in documents submitted to the Governor and Legislature of California the fact of the Government's acquisition of a conditional interest in the Bissell and Aspinwall claim, and its purpose to secure a determination of the validity of the grant by the Board of Land Commissioners. We see that, after this full disclosure, the state expressed consent to the purchase in such a way as to save to the Government unimpaired its rights under the Bissell and Aspinwall bond. Only after the confirmation of the Castro grant by the Board of Land Commissioners, and only after the important questions of law on which the Government relied to defeat the grant had been decided against it by this Court in other cases, did the Government relinquish its purpose to contest the Bissell and Aspinwall claim. We can find in this record no basis for saying that the confirmation by the Board was procured or allowed to stand through any fraud, concealment, bad faith, or breach of duty to California by the Government or its officers.

The contention that the decree of the Board is open to collateral attack as a nullity is thus reduced to the assertion that, by reason of the conditional interest of the Government under the Bissell and

Aspinwall deed and bond, the contest before the Board may have been in some degree less vigorous than it otherwise would have been. To this the answer is that, as already shown, the Government owed no duty to the State to contest the claim and that in any case the proceeding before the Board was not adversary.

The Board was an administrative body, created as the Act declares "to ascertain and settle the private Land Claims in the State of California", by proceedings which were not required to be controversial. It was begun without notice to any other party. While the attendance by the "agent" of the United States was required in order that he might "superintend the interests of the United States", it did not appear in the rôle of litigant. *United States* v. *Fossatt, supra.* The Board was an administrative body, not a court. *United States* v. *Ritchie, supra; United States* v. *Fossatt, supra.* Review of its proceedings by direct appeal was not within the judicial power, and reexamination of its determinations by the district court and the United States Supreme Court was sustained only on the theory that the appeal to the district court was the initiation of a suit to set aside the determination of the Board, in the course of which suit further evidence might be taken. *United States* v. *Ritchie, supra,* 533, 534; *Grisar* v. *McDowell, supra,* 375. Since the statute under which the Board was created did not require adversary proceedings, the validity of its administrative determination was unaffected by their absence. The decree of the Board, which stands undisturbed by any subsequent proceedings in the courts, cannot be disregarded as a nullity.

We conclude that the acquisition of the interest in the Bissell and Aspinwall title by the United States did not undermine that determination; that the proceedings in connection with their claim before the Board of Land Commissioners were free from fraud, bad faith, concealment or overreaching, and of any breach of duty to California on the part of the United States or its officers; and that the decree of the Board stands undisturbed as a valid administrative determination of the validity of the Castro grant and, as such, is conclusive upon the State of California and on respondents who claim under her. The decree below must accordingly be

Reversed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.